(17,301.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 716.

EMILIE SAXLEHNER, PETITIONER,

vs.

ALEXANDER NIELSEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
ALEXANDER NIELSEN, Defendant, Appellant.

Transcript of Record.

Appeals from the Circuit Court of the United States for the Eastern District of New York.

1 *Bill of Complaint.*

Circuit Court of the United States for the Eastern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
ALEXANDER NIELSEN, Defendant. } In Equity.

To the honorable the judges of the circuit court of the United States for the eastern district of New York:

Emilie Saxlehner brings this bill of complaint against Alexander Nielsen, and thereupon your orator complains and says:

1. That your orator is the widow of Andreas Saxlehner, deceased, and resides at the city of Budapest, in the Kingdom of Hungary, and is a subject of the King of Hungary.

2. That the defendant, the said Alexander Nielsen, is, as your orator is informed and believes, a resident of the city of Brooklyn, in the State of New York, and a citizen of said State.

2 3. That said Andreas Saxlehner, late of the city of Budapest, in the Kingdom of Hungary, was at all the times herein mentioned, until the 24th day of May, 1889, the proprietor of a certain well situated at Örsöd, within the city limits of the city of Buda (otherwise known in the German language as the city of Ofen), which city has for about twenty-five years last past been, and is now, united with the city of Pest, under the name of Budapest, in said Kingdom of Hungary, the waters of which well possess valuable medicinal properties.

4. That in or about the year 1863 said Andreas Saxlehner commenced to bottle the waters of said well and to sell the same in the market, and for the purpose of distinguishing his said bitter waters from other bitter waters then known and sold in the market, adopted the arbitrary and fanciful name or trade-mark of "Hunyadi Janos" for his said bitter waters.

5. That by reason of the great care exercised by him in the business of obtaining, caring for and bottling said waters and selling the same in the market, and the valuable properties of said water, said

business soon increased and additional territory was thereafter acquired by said Andreas Saxlehner in which new wells, all giving forth the same water, were opened by him, all being situated near said first-mentioned well, and in a little valley surrounded by considerable hills, the geographical name of which valley and territory contained in it is Örsöd, and thereupon said Andreas Saxlehner applied said name of "Hunyadi Janos" to the bottled water of said springs sold by him in the market.

6. That at or about the time when said Andreas Saxlehner adopted said name of "Hunyadi Janos" as aforesaid, he also adopted a characteristic and novel style of bottles in which said water was
3 sold by him in the market, the same being of a straight shape with a short neck to the top of which was attached a metal capsule bearing the inscription "Hunyadi Janos Budai Keserûviz" (meaning Hunyadi Janos bitter water of Buda) together with a portrait supposed to be the portrait of the mediæval Hungarian hero Hunyadi Janos stamped therein, and a novel and peculiar label covering almost the whole body of the bottle, the characteristic features of which label were a division of the same into three longitudinal fields, the middle field bearing said portrait in a medallion with the name "Hunyadi Janos" written in large letters on the top part of said label, the color of the middle field being red. That thence hitherto said natural mineral waters bottled and sold by said Andreas Saxlehner in Hungary and other European countries and in all the markets of the world have been known and called by said name and trade-mark of "Hunyadi Janos" water. That the said name "Hunyadi Janos" is in no way descriptive of the nature or quality of the water of the said well or wells, but was adopted by the said proprietor as a fancy or ideal name and as a trade-mark to distinguish the water of his said wells in commerce from all other waters.

7. That soon after said business of bottling and exporting said Hunyadi Janos water had been commenced by said Andreas Saxlehner in the year 1863, said water, named, bottled and labeled as aforesaid, became popular and was exported to and sold in all the principal countries of Europe and also the United States of America. That in the countries inhabited by the Latin races the word "Janos" became the common appellation of said water, it being known as "Eau de Janos" or "Aqua di Janos," while in England and the United States of America the name "Hunyadi" became the common appellation thereof, it being known as "Hunyadi water." That in the month of March, 1876, said Andreas Saxlehner executed a contract to a corporation known as the "Appolli-
4 naris Company, Limited," of London, by which he granted to said company the exclusive right to sell his said natural "Hunyadi Janos" bitter water in Great Britain, its colonies and possessions and the United States of America, and other transmarine countries for the term of ten years, which contract was thereafter further extended and terminated on the 25th day of March, 1896.

8. That about the time when said contract was entered into a label was designed to be used on the bottles of such water which

were to be sold through said "Appollinaris Company, Limited," of substantially the same contents and characteristic parts as the label theretofore used, but of a different color, the body of the label being of blue color, while the red color of the central field was substantially retained. That the name "Hunyadi Janos," together with the historical portrait and the name of "Andreas Saxlehner" were retained on said label in the same manner as before, as was also the division into three longitudinal fields; and the general style of the bottles, as also the capsule and imprint thereon above described remained the same. That said label was substantially like the label used by your orator, the successor of Andreas Saxlehner in said business, as hereinafter referred to. That soon thereafter there was added to said blue and red label a small narrow strip on the top thereof in the same blue color containing the printed words "Sole exporters: The Appollinaris Company, Limited, London," which strip has been since retained, the reading of the print being thereafter changed to: "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary."

9. That ever since the adoption of said blue and red label, as aforesaid, in or about the year 1876, large quantities of such bitter water thus bottled and labeled were exported by the said Andreas Saxlehner, through said Apollinaris Company, Limited, to the United States of America, and there sold to the public, and said water became known in the United States of America under the name of "Hunyadi water," and became known under the name as the property of said Andreas Saxlehner, and was ordered and sold under such name, the same being an abbreviation of the name "Hunyadi Janos." That a large traffic and business in exporting to the United States and vending therein said water was established and continuously carried on, and is now carried on, by your orator, as successor in business of said Andreas Saxlehner.

10. That on May 24, 1889, said Andreas Saxlehner died, and your orator, his widow, thereupon succeeded him in said business of bottling and exporting said Hunyadi Janos water, and became and is the proprietor thereof.

11. That since the termination of said contract with said Apollinaris Company, Limited, your orator has continued said business of shipping to the United States and selling therein said Hunyadi Janos water, commonly known as Hunyadi water, in bottles and with labels and capsules thereon substantially as hereinbefore last described, excepting that upon said labels the statement is contained: "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary," in place of an indication of the Apollinaris Company as exporters. And your orator herewith produces and files a specimen of such bottles of mineral water, sold by her as aforesaid, bearing said label, name and capsule as aforesaid, and has marked the same for identification as follows: Exhibit A. That your orator is the sole proprietor of the firm of Andreas Saxlehner, and lawfully doing business in Austria-Hungary under said firm name.

12. That on or about the 12th day of November, 1886, said Andreas Saxlehner duly made application to the United States Pat-

ent Office, according to the statute of the United States there-
6 for provided, for registration of the name "Hunyadi" as his trade-mark for natural aperient waters, and such proceedings were thereafter had that, on or about the 5th day of April, 1887, a certificate of registration of said trade-mark, "Hunyadi," was duly issued to him by said United States Patent Office, dated on said last-mentioned day, and numbered 14252, to which certificate, or a certified copy thereof, ready in court to be produced, your orator refers for greater certainty.

13. That by reason of said sales by your orator and her predecessor in business, and his and your orator's agents as aforesaid, the said word "Hunyadi" upon said label, by her used and her predecessor as aforesaid, dealers in mineral waters and the purchasers and consumers of said water generally have come to know and have long known your orator's mineral water under the names and trade-marks, "Hunyadi" or "Hunyadi Janos," and under the said label and in the style of bottles, capsules and labels as before described, and that the water so furnished and sold by your orator in said United States is procured directly from the well or wells aforesaid, and therefore to rely upon the said label and trade-mark as an assurance and guarantee of the genuineness, strength and purity of the said water, and your orator alleges that said assurance and guarantee was and is of great value to your orator and to the dealers and consumers of said water. And that said water so sold by your orator has come generally to be known, and designated by the trade so called, and by purchasers and consumers of the water in the United States of America by the first and characteristic word of said trade-mark "Hunyadi," the "Janos" being comparatively seldom used in common parlance in this country.

14. And your orator further shows unto your honors that
7 the defendant above named, well knowing the premises and the rights existing in and secured to your orator as aforesaid, but contriving to injure your orator and to deprive her of the benefits and advantages which might and otherwise would accrue unto her from the enjoyment of such rights and to injure and impose upon the public, subsequent to the adoption of the said trade-mark, label, bottle and capsule by your orator and her predecessor, recently and before the commencement of the suit, as your orator is informed and believes, in the city of New York and elsewhere, without license or allowance and against the will of your orator, in violation of the rights of your orator and infringing the said trade-mark, did unlawfully and wrongfully import from Hungary, and sell or cause to be sold bitter water not coming from your orator's said wells in bottles of identical shape and size as those used by your orator and with certain capsules thereon stamped with the words "Hunyadi Lajos Keserüviz," surrounding a similar portrait, all in a manner closely resembling those used as aforesaid by your orator, and with certain labels, in form, color, design and general appearance a close imitation of those used by your orator as aforesaid, and sold the same under the name of "Hunyadi Lajos" bitter water, and also threatens and intends, as your orator is informed

and believes, to continue in like manner to sell the same. And your orator herewith presents and files a specimen of said defendant's bottles with the said capsule and label, having marked the same for identification "Exhibit B." And further that said defendant is in other ways and manner fraudulently and wrongfully endeavoring to sell his said waters, not coming from your orator's wells, as the genuine Hunyadi water of your orator.

15. And your orator further shows that the similarity between the said bottles, capsules, labels and names used respectively by your orator and the defendant is so great that the public and
8 consumers and purchasers are likely to be deceived thereby and to suppose the water so sold by the said defendant to be that sold by your orator and thereby to cause your orator great loss and damage.

16. That, as your orator is informed and believes, said defendant's waters are imported by him from one Louis Schmidthauer, of Kocs, in Hungary, a place far distant from the city of Budapest, where your orator's wells and bottling establishments are situated, and said defendant's waters come from a spring of bitter water situated at said Kocs, near the city of Komorn, Hungary, and which is owned by said Louis Schmidthauer.

17. That for a considerable time last past your orator has carried on a litigation against said Louis Schmidthauer, before the royal Hungarian minister of commerce at Budapest, Hungary, having jurisdiction of such complaints and litigation, for the purpose of cancelling a trade-mark registered in Austria-Hungary by said Louis Schmidthauer for natural mineral water called "Hunyadi Lajos," and that, as your orator is informed and believes, upon due proceedings being had therein, said royal Hungarian minister of commerce, on or about the 9th day of October, 1896, made a decree cancelling the trade-mark of "Hunyadi Lajos" registered by said Louis Schmidthauer, and that by the laws of the Kingdom of Hungary the further use of the name "Hunyadi Lajos" is forbidden to said Louis Schmidthauer, his agents, employees and workmen upon bitter water. And your orator hereto annexes a correct translation into English of said decree, having marked it for identification "Exhibit C."

18. That said defendant represents himself to be the sole agent of said Louis Schmidthauer's establishment for the United States and Canada upon the bottles of such bitter water sold by him. That your orator has duly notified said defendant of her rights
9 and claims in the premises, and requested him to desist from such further sales, but said defendant has refused and still refuses so to do.

19. That the value of the matter in dispute between your orator and the defendant, exclusive of interest and costs, exceeds the sum of two thousand dollars.

20. That by reason of the said acts done or threatened and intended to be done by said defendant, all in defiance of the rights of your orator, as aforesaid, great and irreparable loss and injury has been, is and will be caused to your orator, and she has been and is and

will be deprived of great gains, profits and advantages which might and otherwise would be obtained and enjoyed; and your orator is informed and believes that the said defendant by reason of the said sales of the said water under the name of "Hunyadi Lajos," and the said label, capsule and bottle, has made and realized large profits and advantages, and now has in his possession, or under his control, or subject to his order, a large quantity of said waters so bottled, capsuled and labeled which he proposes to sell, but to what extent said sales have been made and how large profits have been derived therefrom your orator does not know and prays a discovery thereof. And your orator further says that such sales made by the said defendant and the threats and intention of defendant to make such further sales and said unlawful acts in disregard and defiance of the rights of your orator have the effect to and do encourage and induce others to interfere with the said trade-mark and label and to violate and disregard your orator's rights.

And forasmuch as your orator can have no adequate relief, except in this court, to the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and may, according to his best and utmost knowledge, remembrance, information and belief, full, true, direct and perfect answers make to the premises and to all the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of such matters, and may be compelled to account for and pay to your orator the profits by him acquired and the damages suffered by your orator from the aforesaid unlawful acts. But an answer under oath is hereby expressly waived.

Your orator prays that the said defendant, his servants, agents, attorneys and workmen, and each and every of them, may be restrained and enjoined provisionally and permanently by the order and injunction of this honorable court from procuring, parting with, selling or attempting to sell within the United States of America any water or liquid not coming from the said wells of your orator under the name or designation "Hunyadi Lajos" or any name or designation in which the word "Hunyadi" occurs, and also from procuring, parting with, selling or attempting to sell within the said limits any such water in any bottle or vessel imitating or resembling in form, color and general appearance those used as aforesaid by your orator and her predecessor in business, or bearing upon it any capsule stamped in any manner imitating or resembling the said capsules of your orator or any label in form, color, design and general appearance imitating or resembling the said label of your orator on the said bottles of Hunyadi Janos water, and also from procuring, parting with or selling or attempting to sell within said limits any such water put up or contained in bottles resembling and bearing capsules, marks and labels resembling those of your orator or bearing the name "Hunyadi."

And your orator also prays that the defendant may be decreed to deliver up unto your orator any and all labels in his possession upon

which the words "Hunyadi" or "Hunyadi Lajos" appear,
11 or which are made in imitation of or resembling those adopted and used by your orator, and any and all bottles, whether filled or unfilled, and all capsules which imitate or resemble the bottles and capsules used by your orator for said "Hunyadi Janos" water, and to pay unto your orator all profits derived by the said defendant from the sale of any water under the said name "Hunyadi Lajos," or any name or designation in which the word "Hunyadi" appears, or any vessel upon which was or is affixed the label or capsules resembling those adopted and used as aforesaid by your orator, as well as the costs of this suit; and that your orator may have such further relief or such other or different relief as to this honorable court shall seem meet, and as shall be agreeable to equity.

May it please your honors to grant unto your orator the writ of injunction, as well provisional as permanent, issuing out of and under the seal of this honorable court, commanding, enjoining and restraining the said defendant, his servants, agents, attorneys and workmen, and each and every of them as is hereinbefore and in that behalf prayed.

May it please your honors to grant unto your orator the writ of subpœna issuing out of and under the seal of this honorable court directed to the said defendant Alexander Nielsen, commanding him by a certain day and under a certain penalty to be and appear in this honorable court, there and then to answer the premises and to stand to and abide such order and decree as may be made against him.

And your orator will ever pray, &c.

BRIESEN & KNAUTH,
Complainant's Solicitors.
ANTONIO KNAUTH, *Of Counsel.*

12 STATE OF NEW YORK,
Southern District of New York, City and County of New York, } ss:

Kálmán Saxlehner, being duly sworn, deposes and says: That he is the attorney, in fact, of Emilie Saxlehner, the complainant in the above-entitled suit, at the city of New York, and is acquainted with the facts alleged in the foregoing bill of complaint; that he has read the said bill of complaint, and the same is true with the exception of the matters stated to be alleged therein on information and belief, and as to those matters he believes said bill of complaint to be true. That the reason why this verification is not made by the complainant is that said complainant resides in the Kingdom of Hungary, and is not now within the United States and capable of making this affidavit, and that the grounds of deponent's belief as to the matters stated to be alleged on information and belief are official documents relating to said matters received by him from Hungary, correspondence with the plaintiff, and the possession of numerous bottles of bitter water sold by the defendant.

KÁLMÁN SEXLEHNER.

Sworn to before me this 5th day of January, 1897.

GEORGE H. ENGELHARD,
[SEAL.] *Notary Public, N. Y. Co.*

Replication in usual form filed May 4, 1898.

13 Circuit Court of the United States, Eastern District of New York.

EMILIE SAXLEHNER
vs.
ALEXANDER NIELSEN.

Testimony on behalf of complainant in the above-entitled case, taken before Richard P. Morle, special examiner, under the 67th rule in equity, as amended, on the 8th day of June, 1897, in accordance with the notice hereto annexed,* and adjournment endorsed thereon.

Appearances.

Mr. Antonio Knauth, of counsel for complainant.

Mr. S. L. Moody, representing Mr. Louis C. Raegener, of counsel for defendant.

SEYMOUR MCCULLAGH, called as a witness for the complainant, being duly sworn, testifies as follows:

By Mr. KNAUTH:

1 Q. Please state your age, your residence, and your occupation.

A. My age is forty-five; my private residence is Ramapo, Rockland county, New York State; I am a merchant.

2 Q. Have you ever been acquainted with the Hunyadi Janos bitter water of Andreas Saxlehner?

A. Yes, indeed.

3 Q. State when and where.

A. In this city, in the years 1876 to 1878.

14 4 Q. Have you ever sold that bitter water in this market?

A. I did.

5 Q. Now, please state in what kind of bottle and under what style of label you sold that bitter water here. I will hand you this sheet for your convenience.

(Counsel handing the witness a sheet marked Exhibit Hunyadi Janos Labels Used in the United States.)

A. The bottle is the usual upright mineral-water bottle the same as that shown me, and the label was that on the exhibit, the second label from the top, with the name of my firm printed upon it as agents.

6 Q. What was the name of your firm at that time?

A. McCullagh & Company.

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* Annexed to original testimony.

Complainant's counsel offers in evidence the sheet of labels marked as before stated, to which the witness referred in his answer, and the same is marked Complainant's Exhibit Hunyadi Janos Labels Used in the United States.

Objected to as irrelevant and incompetent, except as to the label identified by the witness.

Complainant's counsel also offers in evidence the bottle referred to by the witness in his answer, and the same is marked Complainant's Exhibit Complainant's Bottle.

7 Q. Please state how long you sold bottles of bitter water, bearing the label which has been identified by you on the sheet, in this market.

A. About a year—a little more, perhaps.

8 Q. Did you sell it in a considerable quantity?

A. No, I did not, as it was then quite in its infancy.

9 Q. State about how much you sold.

A. I should say somewhere about from a thousand to twelve hundred cases.

10 Q. Cases containing fifty bottles each?

A. Fifty bottles each.

11 Q. Had you, theretofore, seen in the market any bitter water of the same kind bearing another label?

A. Very little, indeed.

12 Q. What label had you seen on it before?

A. A red label.

13 Q. Do you mean a red and white?

A. Red and white, yes, the same as label No. 1 upon the exhibit.

14 Q. Do you mean the label on the top of the number of labels on that sheet?

A. Yes.

15 Q. How was the Hunyadi Janos water sold by you called in the trade when it was ordered?

A. Hunyadi, or Hunyadi water.

16 Q. Do you mean that when people demanded it they would call for a bottle of Hunyadi water?

A. That is what I mean.

— Q. Was there at that time any other bitter water in the market here bearing the name Hunyadi, except the one which you sold?

Objected to as incompetent.

A. No.

Cross-examined by Mr. MOODY:

18 X Q. Mr. McCullagh, where is your present place of business?

A. 105 Hudson street.

19 X Q. Did you do business at the same place during the years that you have just spoken of?

A. No, I was then in Beaver street.

20 X Q. At what number?

A. 49 Beaver street.

21 X Q. What was your class of business, wholesale or retail?

A. Wholesale entirely.

22 X Q. And when you state that people who called for Hunyadi Janos called for it as Hunyadi or Hunyadi water, you refer only to what your own customers called for?

A. Well, not precisely, because, although being in the wholesale trade, I came in contact with not only retail druggists and so forth, but also the public who used the water, and what I meant to convey was that it was generally spoken of as Hunyadi water.

16 The last clause, "what I meant to convey was" and the following words is objected to as incompetent, and it is moved that it be stricken out.

23 X Q. What means did you have of knowing directly what the general public called this water?

A. Only by coming in contact with these people that I have just spoken of, together with the wholesale people who dealt with them. I never remember it being called in any other way than simply Hunyadi water.

24 X Q. What do you mean by "coming in contact" with these other people other than those who bought Hunyadi of you?

A. I mean that while personally I sold only to wholesale people, yet in traveling about, whether through hotels or through different places of business advocating the quality and merits of the merchandise that I was interested in selling, I would speak about it to the general public.

Redirect by Mr. KNAUTH:

25 Q. Can you tell us anything of the sale of this water in this market after you ceased to sell it?

A. I know the water was sold, and the sale of it very largely increased, but more than that, as to prices and so forth, I don't know very much about it.

Answer objected to as incompetent, except so far as the facts are within the personal knowledge of the witness.

26 Q. Did you receive this Hunyadi Janos water directly from Andreas Saxlehner, or from any other party?

A. I received it from the Appolinaris Company of London, but it came to me direct from the springs in Hungary.

SEYMOUR McCULLAGH.

Subscribed and sworn to before me June 8, 1897.

RICHARD P. MORLE, *Examiner.*

17 Mr. Moody requests that no further testimony be taken at this hearing, stating that Mr. Raegener, defendant's counsel, is actually engaged in taking testimony in a patent case upon an adjournment from yesterday, and that further testimony is being taken at this hour in Mr. Raegener's office before the examiner from Trenton, N. J., in three cases.

Complainant's counsel consents to the adjournment, and it is agreed to adjourn the examination until further notice.

NEW YORK CITY, *June* 28, 1897.

Testimony Taken on Behalf of the Complainant for Final Hearing, in Accordance with the Notice Hereto Annexed.

Present: Mr. Antonio Knauth, of counsel for complainant; Mr. Louis C. Raegener and Mr. S. L. Moody, of counsel for defendant.

Complainant's counsel offers in evidence a certified copy of the certificate of registration of trade-mark, registered by Andreas Saxlehner, April 5, 1887, for natural aperient water, No. 14252, and the statement and declaration and trade-mark thereto annexed. The same is marked Complainant's Exhibit No. 3, Hunyadi registration.

KALMAN SAXLEHNER, being duly sworn to testify the truth, the whole truth, and nothing but the truth, and called as a witness on behalf of the complainant for final hearing, testifies as follows:

By Mr. KNAUTH:

1 Q. State your name, age, residence and occupation.

A. Kalman Saxlehner; twenty-nine years of age; my resi-
18 dence is 150 Madison avenue, New York city; I am the manager of the New York branch of Andreas Saxlehner.

2 Q. When you speak of Andreas Saxlehner, do you mean the firm of Andreas Saxlehner?

A. Yes, that is the firm, but Emilie Saxlehner, she is the proprietor.

3 Q. Are you a son of Emilie Saxlehner, the complainant?

A. Yes.

4 Q. Where were you born?

A. Budapest.

5 Q. How long did you live in Budapest before you came to the United States?

A. All the time until 1895. For ten months in 1887 I have been in England.

6 Q. And since 1895 you have resided in this city?

A. Since November, 1895; yes, sir.

7 Q. What was the name of your father?

A. Andreas Saxlehner.

8 Q. When did he die?

A. In 1889, May 24th.

9 Q. Did he die at Budapest?

A. No, in Vienna.

10 Q. What was the business of your father?

A. The Hunyadi Janos Water business.

11 Q. Is your mother, Emilie Saxlehner, a resident of the city of Budapest?

A. Yes, sir.

12 Q. And a subject of the King of Hungary?

A. Yes, sir.

13 Q. How long have you been acquainted with your father's business?

A. Since my childhood.

14 Q. Now, please state where the springs which were owned by your father, and from which the Hunyadi Janos water is drawn, are situated.

A. They are in the district of Ofen, or Buda; that is the same thing; and the springs are lying in a valley called Örsöd.

15 Q. Is Örsöd situated within the city limits of Budapest?

A. Yes, sir.

16 Q. Was your father the proprietor of this place when he died?

A. Yes.

17 Q. How many such springs are there situated together, or about how many?

A. I think we have one hundred and twelve.

19 18 Q. Were there as many in the beginning when you first knew the business as there are now?

A. No; we had only one at the very first.

19 Q. Do you know when the business of drawing water and selling it was first begun by your father?

A. In 1863.

20 Q. Are you acquainted with the bottles and labels in which this water was sold by your father?

A. Yes, sir.

21 Q. Can you state in what bottles and labels it was sold in Hungary during your early childhood?

A. I have a faint idea, I remember it a little; they were bigger bottles than these, and they had a longer neck, and the shoulders were falling off, and the bottles had a light color.

22 Q. Can you state at what time or about what time bottles of the shape of Complainant's Exhibit Complainant's Bottle were first used in your father's business for selling the Hunyadi Janos water?

A. This kind came later in the market, but this kind of shape we had with the difference that the shoulders were a little broader than this. Altogether the bottle is the same since the beginning of the 70's, but I wouldn't say exactly the year.

23 Q. Was the difference of the width of the shoulders of the bottle a marked difference or a slight difference?

A. No.

24 Q. You mean that the shoulders were only slightly wider than the lower part of the bottle?

A. Yes, sir.

25 Q. So that substantially the bottle looked like the present bottle before you, complainant's bottle?

A. Yes, sir.

26 Q. Can you state under what kind of a label this water was sold during that time of your earliest recollection?

A. It was sold under a red and white label like this here (indicating).

27 Q. I show you the exhibit to which you pointed, which has been marked "Complainant's Exhibit Hunyadi Janos Labels Used in the United States," and ask you to state which of the labels on this sheet you refer to?

20 A. That on the top of the sheet.

28 Q. Can you state how long labels of this kind, in white and red colors, have been used in your father's business in Hungary and in Europe generally?

A. Well, these red and white labels, they are used in Europe today.

29 Q. You mean that they have been used all the time until today?

A. Yes; in Europe, but not in America—that is, with slight differences in the text of the labels.

30 Q. State whether the principal and striking portions of this label, I mean the division of it into three panels, the central panel being red and the right and left panels white and the name Hunyadi Janos, with the vignette of a warrior, have always been the same?

A. Yes, sir.

31 Q. What is the meaning of the words, "Budai Keserüviz Forras," on this label?

A. That means bitter-water spring of Buda, or, I think it is better, bitter-water spring in Buda.

32 Q. So that, as I translate the reading of the central portion of this label it says: "Hunyadi Janos, Buda bitter-water spring, Hunyadi Janos bitter-water spring; proprietor, Andreas Saxlehner, in Pest;" this being the inscription on the label, is that correct?

A. Yes, sir.

33 Q. And then follows a notice in the German language, which, translated into English, means as follows: "The bottles which are filled at the Hunyadi Janos spring are closed by a stopper, on the bottom of which my firm name is burned in, and with a metal capsule, on which is contained the portrait of the Hunyadi Janos. Counterfeits of the water and imitations of the capsule or the label, with intention to make gain thereby, or to deceive the public, are subject to criminal prosecution. Pest, Andreas Saxlehner." Is that correct?

A. Yes, sir.

34 Q. What is the meaning of the word or name Hunyadi Janos?

A. Oh, that is the name of a Hungarian hero who lived in the fifteenth century.

21 35 Q. I notice that this label is signed "Andreas Saxlehner, Pest;" is there any difference between Pest and Budapest?

A. No, only formerly Pest and Buda were two cities, and about the end of the seventies they were thrown together into one city under the name of Budapest.

36 Q. Now, I understand that these two cities were divided by the River Donau?

A. Yes, sir.

37 Q. The springs of your father were situated in that portion called Buda formerly, and more especially in the district called Örsöd?

A. Yes, sir.

38 Q. Please state what the natural boundaries are of this district of Örsöd?

A. It is surrounded by mountains.

39 Q. Are there any other springs of bitter water situated in this district of Örsöd surrounded by mountains than those owned by your father from which water is drawn?

A. Not in the valley.

40 Q. So that, as I understand it, the domain of your father, in which all these one hundred and twelve springs are situated, is shut out by a natural barrier in the shape of mountains surrounding it?

A. Yes, sir.

41 Q. Do you know how many such bitter water springs your father had in the beginning?

A. One well, which he bought in 1863.

42 Q. Can you state what the extended area of your father's spring domain was when he died?

A. I cannot say exactly, it must be some ninety acres, something like that.

43 Q. Is the water of these various wells or springs bottled separately, or is it conducted into common receptacles?

A. The water from all the wells is conducted into cisterns, and from there the bottles are filled.

44 Q. And when your father died who succeeded him in this business?

A. My mother, Emilie Saxlehner.

45 Q. Is she now the proprietor of the domain in which these springs are situated?

A. Yes, sir.

22 Defendant's counsel objects to the question and answer as a legal conclusion, and on the ground that it is incompetent and not the best evidence.

46 Q. And has she been such proprietor ever since the time that your father died?

A. Yes, sir.

47 Q. Did your father leave a last will?

A. Yes, sir.

47½ Q. Will you produce it hereafter?

A. I will.

48 Q. How many people are employed in the complainant's business of bottling this water and selling it?

A. About three hundred.

49 Q. Can you state how long this bottling establishment has existed?

A. The bottling establishment has existed since the very first year.

50 Q. And you mean it has been from time to time increased?
A. Yes, sir.
51 Q. Did your father sell this Hunyadi Janos water outside of the limits of Hungary?
A. Yes, sir.
52 Q. To what countries was it sold?
A. All the countries in the world. I know this from my experience in the business.
53 Q. Was the bitter water and its name advertised by your father?
A. Yes, sir.

Defendant's counsel objects to that statement as to the name of the bitter water unless the witness states what was advertised, it being a question as to what is the name of the bitter water.

54 Q. You have before stated that you spent ten months in England; have you traveled in any other European countries?
A. Yes, sir.
55 Q. In what countries?
A. Austria, Germany, France, Italy, Switzerland, Belgium, Netherlands, and some part of North Africa.
56 Q. Can you state under what name or names the Hunyadi Janos water is sold in these countries?
23 A. Well, that is very different. In Germany or in England they call it Hunyadi water or Hunyadi Janos water, while in French or Italian countries they mostly call it Janos water, Aqua di Janos, or Eau de Janos.
57 Q. Do you know when this Hunyadi Janos water, with the red and white label already identified by you, was first sold by your father to the United States of America?
A. As I can see it out of our copy books and old letters, I should think it was exported to the United States in 1872 or 1873.
58 Q. That was with the red and white label?
A. Yes, sir; or it may be before that time.

Objected to, the facts not appearing to be within the knowledge of the witness.

59 Q. Now, please state whether there was a change in the colors of the label made in or about the year 1876, and what it was.
A. Yes, until 1876 the red and white label was imported to this country, and from 1876, when the contract was made with the Apollinaris Co., the color of the label was changed to blue.
60 Q. Was the red field in the centre retained on the blue label?
A. Yes, sir.
61 Q. If I understand you correctly, since making the contract in 1876 with the Apollinaris Company, the Hunyadi Janos water was exported to this country only under blue and red labels, substantially as those shown on the sheet before you?
A. Yes, sir.
62 Q. Now, can you state during what years the various red and

blue labels, shown on this sheet, have been used in the sale of Hunyadi Janos water in this country?

A. As I know, there were four changes. The first was the label with "McCullagh & Company," then it was labeled with "De Bary," then it was this label without any red inscription, but with the words on top of it, "Sole exporters: The Apollinaris Company, Limited, London," and after the contract expired with the Apollinaris Company in 1896, we have this last label here with the
24 inscription, "Proprietor: Firm of Andreas Saxlehner, Budapest, Hungary."

63 Q. How do you account for the different shading of the red and blue color in these various specimens contained on the exhibit sheet?

A. Oh, we can't help that, the color changes sometimes in the hands of the printer.

64 Q. It is a matter of accident, you mean?

A. Yes, just as the blue color has sometimes slight differences.

65 Q. Is the complainant, Emilie Saxlehner, doing business at Budapest under the firm name of Andreas Saxlehner?

A. Yes, sir.

66 Q. Please explain how this came about.

A. My father in his last will left the business, the firm and the trade-marks to my mother, made her sole proprietor.

67 Q. Then your father in his lifetime had already registered or entered a firm of the name of Andreas Saxlehner in Hungary?

A. Yes, sir.

68 Q. And that firm is still registered in Hungary?

A. Yes, sir.

69 Q. And owned by your mother?

—. Yes, sir.

70 Q. Can you state approximately how large this business of bottling and selling the Hunyadi Janos water is, or what its output has been?

A. Since the beginning?

71 Q. Yes.

A. About one hundred million bottles.

72 Q. At what prices is the Hunyadi Janos water sold to the consumer in this country?

A. Twenty-five cents.

73 Q. And at what prices does the complainant sell to the wholesale or retail trade?

A. That is different. A small quantity, that is a single case, sell it for ten dollars.

74 Q. A single case of fifty bottles?

A. Yes, and at wholesale by twenty-five-case lots, we sell it for eight dollars and fifty cents.

75 Q. Have these prices been uniform so far as your experience goes?

A. Yes, sir.

76 Q. I now show you a copy of a contract with the
25 Apollinaris Company, Limited; please state whether that is a

correct copy of the contract to which you have referred with that company.

A. Yes, sir; I think that is a true copy.

Complainant's counsel offers in evidence the copy of contract referred to by the witness, and the same is marked Complainant's Exhibit 4, Apollinaris contract.

Objection as to this exhibit reserved.

77 Q. Please state whether after making this contract in 1876, your father, and after his death your mother, continued to ship to the United States and sell in this country the Hunyadi Janos water?

A. No.

78 Q. In what manner was it sold while this contract was in force?

A. We sold it to the Apollinaris Company, and the Apollinaris Compamy resold it in the different countries except the European continent and Smyrna.

79 Q. Including the United States?

A. Yes.

80 Q. When did this contract expire?

A. The contract expired in March, 1896.

81 Q. Had the Apollinaris Company given notice to terminate it?

A. Yes.

82 Q. Now, in March, 1896, what did you or the complainant do to sell the Hunyadi Janos water in this country?

A. We advertised it.

83 Q. Did you open an office?

A. We opened a branch office to come in contact with the United States trade directly.

84 Q. That branch office was opened in New York city, and you are in charge of it?

A. Yes, sir.

85 Q. Was your father ever in the United States, or your mother?

A. No; neither of them.

86 Q. If I understand the situation correctly, the Hunyadi Janos water, between the years 1876 and 1896, was sold in this country only through your consignees, the Apollinaris Company, Limited, is that correct?

A. Yes, sir.

26 87 Q. Are you acquainted at the present time with the quantities of Hunyadi Janos water which the Apollinaris Company has sold in this country from year to year under this contract?

A. Oh, I don't like to answer that question because I don't know it definitely.

88 Q. About how much is the sale of Hunyadi Janos water now, or how much has it been since 1896, the spring of that year?

A. I don't know exactly; about fourteen thousand cases.

89 Q. When did you first see a bottle of the Hunyadi Lajos water, as it is sold by the defendant?

A. When I came to this country.

90 Q. That was in 1895?

A. It may be that I saw one of these labels; I don't know which it was; one of these was registered in Hungary, and I believe I saw the registration at one time.

Complainant's counsel offers in evidence the specimen bottle referred to by the witness, and the same is marked Complainant's Exhibit 5, defendant's bottle.

91 Q. Please state what the meaning of the words contained on the central part of the defendant's label is, "Kocsi Hunyady Lajos Keserüviz"?

A. Well, that means Hunyady Lajos bitter water from Kocs.

92 Q. I find that the label bears a notice printed on its central portion which, translated into English, reads as follows: "Each bottle bears this label, and is closed with a metal capsule, on which the name Schmidthauer Lajos is impressed, and with a cork on the bottom of which the word Lajos is burned in. Counterfeits of the water and imitations of the capsule or the label are subject to criminal prosecution. Only accurate attention to the label will prevent deceptions. Administration of the Kocs springs." Please state whether that is a correct translation.

A. Yes, sir.

93 Q. Please look at the capsule on the bottle and state
27 whether the name "Schmidthauer Lajos" is impressed in the same, as stated in this notice, or not?

A. No, the name Hunyady Lajos Keseruviz is impressed on the label.

94 Q. Now, please state what the meaning of the inscription on the bottom of the bottle is, "Hunyady Lajos U Radetzky."

A. Hunyadi Lajos, and the U stands for and, Radetzky. I also find in addition thereto the words "Verein (association) bitter springs."

95 Q. Is there such a person known to history as Hunyady Lajos?

Objected to as immaterial and incompetent.

A. No.

96 Q. Is there any person known to you by the name of Hunyady Lajos?

A. No.

97 Q. Do you know who owns the springs from which the Hunyady Lajos water is drawn?

A. Schmidthauer Lajos.

98 Q. Does "Lajos" in Hungarian mean the name "Louis"?

A. Louis, yes.

99 Q. And "Janos" means John?

A. Yes.

100 Q. Where is Kocs situated?

A. That is in the County Komorn, in the northwestern part of Hungary.

101 Q. And how far distant from Budapest is it?
A. It must be very near one hundred and fifty kilometers, I can't say exactly.
102 Q. That would be about seventy English miles?
A. A little more than that, nearly one hundred.
103 Q. This bitter water sold as Hunyady Lajos is of a different composition from the Hunyadi Janos water, is it?
A. Well, I think so, yes.
104 Q. By what name is the Hunyadi Janos water commonly sold by the complainant in this country?
A. Hunyadi water.
105 Q. Is it also ordered and sold as Hunyadi Janos water?
A. Yes; it is sold as Hunyadi Janos, and as Hunyadi water.
106 Q. Has this always been the case, so far as you can
28 remember?
A. Well, in the United States since I am here; yes.
107 Q. Is the name Hunyadi of value to you in your business?
A. Yes; it is.
108 Q. Of great value?
A. Yes; we wouldn't give it up for anything.
109 Q. Can you state approximately how much money has been spent in the business of your farther and mother in advertising the name of their water?
A. Well, I cannot name the sum, but hundreds and hundreds of thousands of dollars we have surely spent already.
110 Q. Have your father, and your mother after him, endeavored to make the water known to physicians?
A. Yes, sir.
111 Q. I show you now a printed book entitled "Saxlehner's Hunyadi Janos Bitter Water Spring," and ask you to state what that is.
A. That is a pamphlet containing a description of the springs and medical testimonies.
112 Q. Was that gotten up as one of the means of advertisements of the Hunyadi Janos water?
A. This book was sent out all over the countries to physicians.
113 Q. Also through this country?
A. Not this book.
114 Q. Have you other books which you send out to this country?
A. I think we did send before we had the Apollinaris contract.
115 Q. And when the Apollinaris contract was made then the Apollinaris Company attended to the advertising?
A. Yes, sir.
116 Q. It has been stated by agents of the Apollinaris Company that an amount of £39,000 was expended by that company in advertising the Hunyadi Janos water; does that tally with your experience in the matter?
A. I don't know exactly how much they did advertise it.
117 Q. Do you know whether it was largely advertised?
A. I have seen many advertisements.

118 Q. You mean advertisements of the Apollinaris Com-
29 pany in this country?

A. Made by the Apollinaris Company for the Hunyadi water. Since the contract with the Apollinaris Company expired we have sent out in this country books like the one shown to me to physicians in this country.

119 Q. Can you state about how many?

A. About ninety thousand.

120 Q. Can you state how much it cost to print this book, which contains more than two hundred pages?

A. Yes; I know about how much. It cost about, with the sending, 40.000 florins.

121 Q. Which is equal to about $20,000?

A. About $16,000.

122 Q. Please state how the complainant contrives to get a water of uniform strength from these wells.

A. We have a system of cisterns, and we lead the water from the different wells in such a way that we always can produce the water of the same specific gravity and strength.

123 Q. Is it not a fact that the water at the bottom of such a mineral well will be more heavily charged with salts than at the upper portion?

A. Yes, that is the natural thing.

124 Q. And is it this which is equalized by leading the water into subterranean cisterns?

A. Well, not exactly, because the wells sometimes are different in specific gravity, you know, and again, the lower part of the water in a well is of a somewhat greater specific gravity than the upper part.

125 Q. Is the specific gravity of the water measured by instruments before the water is filled into bottles?

A. Yes, it is measured every time.

126 Q. Are there any precautions taken to preserve the water of the wells against impurities?

A. Yes, sir, every well is covered with a wooden house, and the wells themselves are closed by iron doors.

127 Q. Is there anything done about the grounds to keep the grounds clean?

A. Yes, sir; we have drainage, so that rain water or surface water should not remain on the ground.

30 Complainant's counsel offers in evidence the book referred to by the witness entitled, "Saxlehner's Hunyadi Janos Bitter Water Spring," and the same is marked Complainant's Exhibit 6, advertisement book.

Objected to as immaterial, and further objected to as showing anything except the fact that such an advertising pamphlet was issued.

128 Q. Now, state what your experience has been as to the use of defendant's Hunyady Lajos water by druggists in this country?

A. Well, it is often sold as Hunyadi Janos water.

Answer objected to unless the witness will state his means of knowing this fact.

The WITNESS: I can state it by my personal experience.

129 Q. Please do so.

A. It often happened to me when I wanted to buy my Hunyadi Janos water, and asked for it, I was given Hunyady Lajos water. I can't say exactly where, but one drug store I remember exactly last year it happened, corner of Twenty-seventh street and Fourth avenue. But this was not the only occasion. Especially it is given as Hunyadi Janos when the druggist serves it at the bar in glasses, and that happened to me five or six times.

130 Q. Do you drink Hunyadi Janos water for your health?

A. Yes; I do.

131 Q. And was that the way in which you came to ask for a glass of Hunyadi Janos water?

A. Yes.

132 Q. And you say that this has repeatedly happened to you here in New York city?

A. Yes.

133 Q. Can you produce one of the books in the English language which you have published and disseminated among the public of this country, containing views on complainant's water and its success in the market?

A. Yes, I can. Here is a specimen of it. We have sent
31 out, and are still sending out about ninety thousand of these books to physicians in the United States.

134 Q. I notice that the book produced by you contains a pictorial illustration of Andreas Saxlehner's establishment; is the same a correct view of the establishment and its surroundings?

A. Yes, sir; it is made after a photograph.

Complainant's counsel offers the book in evidence, and the same is marked Complainant's Exhibit 7, English advertisement book.

Same objection as to Complainant's Exhibit 6, advertisement book.

135 Q. State whether complainant's water has been advertised on the continent of Europe and other countries in a similar manner?

A. Yes, sir.

136 Q. For how long?

A. Since we have the business, that is, since the Hunyadi Janos business existed. On the continent, where we did direct business, we advertised always.

137 Q. Can you state under what label Louis Schmidthauer sold the Hunyady Lajos water in Hungary and in other countries of Europe?

A. Under a red and white label.

138 Q. Are you acquainted with that red and white label?

A. Yes, sir.

139 Q. Is that a copy of it (indicating)?

A. Yes, sir.

140 Q. Have you procured a certificate from the chamber of commerce at Budapest relative to the registration of that red and white label by Louis Schmidthauer?

A. I have.

141 Q. And its subsequent cancellation?

A. Yes.

Complainant's counsel offers in evidence the certificate produced by the witness, to which said label is attached, and the same is marked Complainant's Exhibit 8, certificate of registration and cancellation of red and white Hunyady Lajos label.

Objected to as immaterial and irrelevant to the issues.

32 142 Q. Can you produce a certificate of registration of the trade-mark Hunyady Lajos in Hungary, procured by said Louis Schmidthauer on July 16, 1894, under No. 37, and its subsequent cancellation?

A. Yes, I can, and do.

Complainant's counsel offers in evidence the certificate referred to by the witness, and the same is marked Complainant's Exhibit No. 9, certificate of registration and cancellation of Hunyady Lajos label No. 37.

The same objection.

143 Q. Can you produce an exemplified copy of the ministerial decree of cancellation of the trade-mark Hunyadi Lajos, No. 37, as issued on October 9, 1896?

A. Yes, sir; I can and do.

Complainant's counsel offers in evidence said decree, and the same is marked Complainant's Exhibit 10, decree of Hungarian minister of commerce.

Same objection.

144 Q. Are you familiar with the litigations which the complainant has instituted against said Louis Schmidthauer in Hungary for the purpose of bringing about a cancellation of the trade-marks registered by Louis Schmidthauer for the Hunyadi Lajos water?

Objected to as immaterial and irrelevant.

A. Yes, sir.

145 Q. State when the same were commenced?

A. The beginning of the summer of 1896. We had lawsuits before that in 1894. That is, after the new law in 1890 came into force, then we sued all those who had similar labels and Hunyadi names, and in 1891, I think, we filed a complaint with the minister. As the complaint was a collective suit, it was refused, and our lawyer had to separate each complaint. These complaints were

33 filed in 1893, and in 1894 we received decisions of the minister upon these complaints, in consequence of which the form of labels of the several defendants had to be changed. Then afterwards, in 1895, a new trade-mark law was passed which made possible the registration of word trade-marks, or of words, and a

once Mrs. Emilie Saxlehner made a complaint regarding the use of the Hunyadi name. In 1896, in the fall, the minister decided that the Hunyadi name or Hunyadi Janos name is the trade-mark of Andreas Saxlehner, and nobody is allowed, in Hungary, to use the word Hunyadi for other waters, and all registrations of the defendants have been wiped out of the register.

Defendant's counsel renews his objection, and further objects to the answer as incompetent and not the best evidence of the matters therein cited, and moves to strike out the same.

146 Q. What I want to know is whether the complainant, subsequent to the law of 1890, took steps to bring about a cancellation of the marks and trade-marks registered in Hungary by other people owning springs, and which contained the word Hunyadi in some form or other?

The same objection.

A. Yes, sir; we did take steps.

147 Q. And these litigations extended through a period of from 1891 until the fall of 1896?

A. Yes.

148 Q. What is the reason that previous to 1890 no such litigations were commenced by the complainant in Hungary?

A. We had one litigation in 1887 against one man who used the Hunyadi name. The trade-mark law before 1890 did not give any protection, and therefore we never could succeed.

149 Q. Do you know, as a matter of fact, whether or not at the present time there are any other bitter waters sold in Hungary under names employing the name Hunyadi?

A. As I know and believe, no, and I have been myself in
34 the register's office and looked through the files, and every one of them has been wiped out.

150 Q. Do you mean every one of the other labels filed by others containing the name Hunyadi?

A. Yes, sir.

151 Q. Can you state how voluminous the collective complaint was which the complainant first instituted against the various infringers in Hungary in the year 1891?

Objected to as immaterial.

A. Several hundred pages and about five hundred exhibits.

152 Q. Can you state what the name of Schmidthauer's spring originally was before he named it Hunyady Lajos?

A. He sold the water under the name of Nagy Igmandi keseruviz, which means, bitter water from Nagy Igmandi.

153 Q. Was Nagy Igmandi the name of the place where the spring was situated?

A. It was the name of the place where the spring was, but later he had a well near Kocs, and from this well, after 1887, he began to draw a water which he named Hunyady Lajos.

154 Q. Do you know whether the Hunyady Lajos water of the

defendant is sold at the same price as yours in this market, or at another price?

—. No; it is cheaper.

155 Q. For how much is it usually sold?

Objected to as immaterial.

A. It is very different, I don't know exactly, but at retail to the consumer very often one can buy it for seventeen or eighteen cents; in some cases they ask twenty-five cents, but that is when Hunyadi Janos is asked for.

156 Q. Have you brought any suits here on behalf of the complainant against parties who had sold Hunyady Lajos water as and for Hunyadi Janos water in this country?

A. Yes, sir.

35 157 Q. And obtained judgments or orders of injunction against them?

A. Yes, sir.

Direct examination closed.

Adjourned to Wednesday, June 30, 1897, at 11 a. m.

NEW YORK CITY, *June* 30, 1897.

Hearing resumed.

Present: Counsel as before.

Cross-examination of KALMAN SAXLEHNER.

By Mr. RAEGENER:

8 157 X Q. When was it that your father bought an additional well or two after the year 1863?

A. In the same valley where the Hunyadi Janos water comes from now.

159 X Q. You didn't understand my question. You have testified that your father began the business with one well, which he bought in 1863; when did he buy the next well?

A. He didn't buy a well; we bought the land which surrounded the first well, and we dug the wells out.

160 X Q. When?

A. That I can't tell you.

161 X Q. About when did your father buy additional land and dig additional wells?

A. It must have been right in the following years after he bought the place where his first well was.

162 X Q. About what year; about 1866?

A. I couldn't swear to it, but it must have been before that.

163 X Q. Does any one know?

A. Yes.

164 X Q. Who knows?

A. I could produce many witnesses who know.

165 X Q. Have you any documentary evidence in your possession or under your control?

36 A. Not at this moment, but I could procure it; all these things are registered.

166 X Q. Will you kindly produce either the original deeds whereby the complainant or her husband became posseessed of additional land, or other papers from which, with reasonable certainty, these data can be ascertained?

A. Yes, sir; I will.

167 X Q. Are you able to say how many wells your father owned or had in use or operation in about the year 1870?

A. It is very diffiicult for me to say, because in 1870 I was only two years old.

168 X Q. I know you were two years old in 1870, but you have undertaken to testify with respect to matters that occurred many years before you were born?

A. Well, he had several springs already for wells.

169 X Q. In the year 1870?

A. Yes, sir.

170 X Q. When did he get the greater part of his springs; in what year?

A. It must have been in the latter part of the '70's or in 1880.

171 X Q. And then since 1880 he has been opening additional wells, has he not?

A. Yes.

172 X Q. How far is the furthest well situated from the original well that was opened in 1863?

A. About one-third of a kilometer or about a quarter of a mile—about five minutes' walk.

173 X Q. I read in the German pamphlet which you have put in evidence that the Belgium consul reported that the mineral springs were a great source of wealth for Hungary, and that in about the year 1885 there were 62 different mineral springs in existence; where are the other mineral springs situated that do not belong to your father in Hungary, from which mineral water is bottled?

A. If you refer to the consul's statement, he meant probably all the natural mineral springs of Hungary. They are situated in several different parts of the country. You will find mineral springs in the west, in the east, in the north and in the south, and they are bitter waters, sparkling waters, and all kinds.

37 174 X Q. You testified, in answer to question 39, as to whether there were any other springs of bitter water situated in the district of Örsöd, that there were not in the valley; are there any in the mountains?

A. I think there is one on the Dobogo mountain.

175 X Q. That bitter-water spring is not owned by Andreas Saxlehner?

A. No.

176 X Q. Is the bitter water of that spring bottled?

A. That I can't say. I never saw it on the market.

177 X Q. How far is that situated from your mother's property?

A. About 200 yards.

178 X Q. Where are the Schmidthauer springs situated?

A. They are in Komorn.

179 X Q. Is that in the valley?

A. In our valley? No.

180 X Q. In a valley or in a mountain?

A. I never have been to Schmidthauer's spring, but I don't think it is in a valley, because it is all a flat country there. That is several hundred miles away from our spring.

181 X Q. Are you a chemist?

A. No.

182 X Q. Have you made an analysis of the Huyady Lajos water?

A. Never.

183 X Q. You don't know whether the composition of the Hunyady Lajos water is different from the composition of the Hunyadi Janos?

A. Well, I think it is different.

184 X Q. Andreas Saxlehner has been obliged, under the contract with the Apollinaris Company, to keep the water sold by that firm up to a certain standard; is that so?

A. Yes.

185 X Q. How did he manage that?

A. He had to take always the water from those wells that were according to that standard.

186 X Q. How many wells were there from which Andreas Saxlehner took the Hunyadi Janos bitter water which was of the standard required by the Apollinaris contract?

A. That was different, just as the wells very often differ in specific gravity.

38 187 X Q. Then you mean to say that sometimes, in order to get the required standard, Andreas Saxlehner took the water from one well, and sometimes from another, is that it?

A. We took water from those wells which were in use.

188 X Q. You have just said that the water of these various wells differed at different times; that Andreas Saxlehner tried to satisfy the Apollinaris Company by keeping the required standard, and in order to do so took the water from certain wells from time to time?

A. Not certain wells from time to time; from every well from time to time there was water delivered to the Apollinaris Company, but as every well changes as to strength, it may be in a fortnight, it will be weaker or stronger. There are several springs there, and always springs among them in which the quality required is found.

189 X Q. How did Andreas Saxlehner manage to get the quality of the water up to the required standard, if at the time the water from the particular well which he was using was too weak and was not up to the required standard?

A. We had later a cistern system, and by computation of the composition used we mixed the waters of those springs in the cistern to get the required quality or specific gravity.

190 X Q. When did you adopt the cistern and the mixing of the waters from the various springs; when did you adopt this system?

A. Must have been fourteen or fifteen years ago.

191 X Q. About the year 1882 or 1883?

A. I think so.

192 X Q. Then I take it that between 1863 and 1883 Andreas Saxlehner, at different times, bottled the bitter water of different springs, but that from about the year 1883 up to the present time he has allowed the water of all his springs to flow into a cistern?

A. Yes, except the very weakest springs or wells we do not use.

193 X Q. What do you do with the waters of the weak springs?

39 A. We keep them for washing the bottles. They are near the mountains; they are high up, and, therefore, the water is weaker.

194 X Q. Now, after the water of all these various springs runs into a cistern, what do you do with it?

A. We fill it into the bottles.

195 X Q. Right out of the cistern?

A. Yes.

196 X Q. Don't you regulate the quality of the water in any way?

A. That is regulated already; when it is in the cistern it has the quality.

197 X Q. Where do you regulate it?

A. That is regulated in that way. At first all the wells are every week twice or three times measured in specific quality, and the water from those wells of which the specific quality is satisfactory is conducted to the cistern.

198 X Q. But the specific gravity of the water of all these wells differs somewhat?

A. Yes, it differs a little, not very much, but we have our exact specific gravity so that even in a time of ten years we brought always the same quality to the market.

199 X Q. Yes, I have no doubt that during the last ten years the firm of Andreas Saxlehner has manufactured the water in such a way as to bring it upon the market always of about the same relative composition, but what I asked you was whether, as a matter of fact, the specific gravity of the various waters taken from the various springs and the composition does not differ somewhat, or are the waters and the composition of the waters of all the springs exactly the same?

A. The specific gravity differs but not the chemical composition, because by every analysis it is proved that the sulphate of magnesia and the sulphate of soda in our water is nearly the same, equal quantity of both, while in different other springs the proportion between these two ingredients differs.

200 X Q. You misunderstand me; I am not denying that the water which you finally bottle and sell differs in different wells, but what I want to know is whether the composition of the waters of the various springs do- not differ from each other; in other

40 words, is there not more magnesia in the one than in the other, or more sulphate of soda in the one than in the other?

A. No, that is what I said, that in one well, even if the water should be weaker in specific gravity than in the other well, or in

the tenth or fiftieth well, still the chemical composition of each of these waters of the wells is similar, that is, that the sulphate of magnesia and the sulphate of soda in each water of the different wells has the same proportion.

201 X Q. What is the reason that the specific gravity of the water in these various wells changes?

A. By celebrated geologists it was proven that it is dependent upon the mass of water that collects in the mountains, and upon atmospheric conditions.

202 X Q. I show you Liebig's analysis, on the 18th page of Complainant's Exhibit 6, and ask you whether you mean to testify that the water of each and every one of the wells owned by the firm of Andreas Saxlehner contains exactly the same relative proportion of the various chemicals mentioned in Liebig's analysis at all times?

A. Yes; only I don't know to the thousandth part or so. There may be very slight differences in the proportion at times from this analysis.

203 X Q. When was it that you say that your father gave the name of Hunyadi Janos to a certain well upon his land?

A. He called the water Hunyadi Janos as soon as he bought it and commenced selling it, and this was in the end of 1863.

204 X Q. At that time he owned one well, is that it?

A. Yes.

205 X Q. When was it that you first commenced to take an active interest in your father's business; in what year?

A. Winter of 1888.

206 X Q. How old were you then?

A. Twenty years old.

207 X Q. At that time your father shipped all his water to the United States to the Apollinaris Company, did he not?

A. Yes, it went through the Apollinaris Company.

41 208 X Q. Did you ever see the advertisement published by the Apollinaris Company, in connection with the Hunyadi Janos water, to the effect that the word "Hunyadi" was a generic term, and that the object of the diamond was to distinguish the Hunyadi Janos from other Hunyadi waters?

A. I saw that now when I came to America.

209 X Q. When was that?

A. I came in 1895, in November.

210 X Q. Then you saw it?

A. That is, I didn't see the advertisement. I was told so by other persons.

211 X Q. In the year 1888, there were a great many Hunyadi waters with different adjectives sold throughout the world, were there not?

A. Well, in Hungary, and I know only about Hungary at that time, there were several waters which used the name Hunyadi.

212 X Q. Who were they; what were the names of the waters?

A. Hunyadi Matyas, Hunyadi Josef; I can't say more about this because I don't remember exactly how it stood, only I knew that there were waters that used the Hunyadi name. I know it because

I often heard at that time that my father made efforts to stop them from using the Hunyadi name.

213 X Q. There was a Hunyadi Arpad at that time?

A. Yes, sir.

214 X Q. When was that?

A. Arpad was already at that time in 1888.

215 X Q. That was a water that was sold in Hungary, was it not, Hunyadi Arpad?

A. I don't know exactly whether it had a sale in Hungary; it may be that it was sold in Hungary in small quantities, too.

216 X Q. How long had that Hunyadi Arpad been on the market?

A. That must have appeared on the market some years after 1880, so far as I know.

217 X Q. What happened to this? Is it not a fact that your father bought up that spring?

A. Yes, he did.

42 218 X Q. When did he buy it up?

A. It wasn't my father bought the spring; it was after his death; I think it was in 1893; I can't state the date exactly.

219 X Q. Where is this bitter-water spring situated from which the Hunyadi Arpad water was bottled and sold?

A. Situated in the valley of Örmezö.

220 X Q. How far is this Örmezö situated with respect to your father's place; how far from it?

A. About thirty or thirty-five minutes' walk; I don't know how many miles that would make. It is behind the Dobogo mountain.

221 X Q. On the other side of the mountain?

A. Yes, in another valley.

222 X Q. What did you do with the bitter water of this spring after your firm bought it?

A. We closed and shut up all the wells that were on the ground.

223 X Q. How many wells were there on that ground?

A. I can't say exactly as to that, but I think about five or six.

224 X Q. Then, as a matter of fact, according to your best recollection, from about the year 1883 to about the year 1893, Hunyadi Arpad water was sold in Europe and elsewhere, and it was the water bottled from this spring which in about the year 1893 your firm bought?

A. Yes.

225 X Q. How long had the Hunyadi Matyas water been sold as Hunyadi Matyas in Europe?

A. I believe since 1879 or 1880.

226 X Q. From about the year 1879 until when was this bitter water bottled and sold as Hunyadi Matyas?

A. Till 1896.

227 X Q. That water under that name Hunyadi Matyas is still being sold in New York city, is it not?

A. As I see, yes.

228 X Q. Who sells that water here?

A. Eisner & Mendelsohn.

43 229 X Q. How long has this Hunyadi Matyas been sold i
the United States, so far as you know?

A. As I know, since 1886.

230 X Q. When was it that your contract with the Apollinari Company terminated?

A. March, 1896.

231 X Q. So that for a matter of ten years during the existenc of a contract between your firm and the Apollinaris Company th Hunyadi Matyas bitter water was sold under *under* that name i the United States. Now, do you know of any other bitter wate that has been sold during that period between 1886 and 1896 in th United States, except the water of your firm, in connection wit which the name Hunyadi was used?

A. I think, as I hear, the Hunyadi Arpad water was sold in th United States in the end of the '80's, that is, after 1886.

232 X Q. Then in addition to the Hunyadi Matyas water, th Hunyadi Arpad bitter water was also sold, from about 1886 or 188 until along about 1893, is that right?

A. Yes, sir.

233 X Q. Where is the spring of the Hunyadi Matyas?

A. That is in Lagymanyas.

234 X Q. How far is that place located from your father's place

A. Oh, that is a great distance, several miles.

235 X Q. About how many miles?

A. It must be six or seven or eight English miles.

236 X Q. Can you name any other springs before the year 189 that were bottling bitter water under the name Hunyadi that wer located in Hungary, in addition to the Arpad and Matyas?

A. Hunyadi Vilmos and Hunyadi Alajos. But these waters wer only in the very last years called Hunyadi.

237 X Q. Where is the spring from which the Hunyadi Vilmo is taken?

A. That is near Szagedin.

238 X Q. How far is that place situated from your father's plac

A. That is about one hundred and fifty miles or more; I cannot say exactly, but you can go there with an express train in fou hours.

44 239 X Q. How long was this Hunyadi Vilmos bitter wat upon the market, during what period?

A. In Hungary?

240 X Q. Yes.

A. It must have been in the very latest years—in the last two three years the water was on the market, but, if I am well informe it was under another name without Hunyadi.

241 X Q. Now, coming to this Hunyadi Alajos, how long was th bitter water upon the market?

A. About the same time that the Hunyadi Vilmos was, and t spring from which it is taken is the same spring from which t Hunyadi Vilmos is taken.

242 X Q. Have you now given us the names of all the Hunya

waters with which you are familiar and that have been sold during the last ten years under the name of Hunyadi?

A. Here?

243 X Q. Anywhere.

A. No, I could give you a greater list than that.

244 X Q. Well, give us a greater list?

A. These waters came to the market inside of the last three years, and so, I believe, Hunyadi Jonas, Hunyadi Miklos. I am not quite sure whether Hunyadi Miklos has been sold in greater measure in Hungary, because I think the Hunyadi Miklos was exported more to the United States, but not in large quantities.

245 X Q. It was sold in the United States, however?

A. I think a small quantity.

246 X Q. Where were the springs of this Hunyadi Miklos situated, how far from your father's place?

A. They are, perhaps, ten miles or so; they are in another county.

247 X Q. Can you mention any other mineral-water springs?

A. Hunyadi Istvan; the Hunyadi Istvan belonged to the same man as the Hunyadi Matyas, I believe, but except, perhaps, in Hungary, it wasn't in the market at all.

248 X Q. How long was it in the Hungarian market?

A. It may be some time in the '80's, but I can't say exactly.

249 X Q. Until when?

45 A. Whether they sold the water later or not I really don't know; I only know that the trade-mark Hunyadi Istvan was in the register until 1896, when it was wiped out.

250 X Q. Where was the spring Hunyadi Istvan situated?

A. Near the Hunyadi Matyas spring.

Redirect examination by Mr. KNAUTH:

251 Q. You stated on your cross-examination that there was a well or spring of mineral water situated on the mountains surrounding the complainant's domain on which the Hunyadi Janos water is found; is that spring also a spring of bitter water?

A. Yes.

252 Q. Do you know whether the waters of that spring have ever been bottled and either sold or shipped to other places?

A. As to that I cannot say exactly, I only heard something that they sent a few cases to a hospital at Budapest.

253 Q. How was that water named?

A. As I heard, Maria Theresia.

254 Q. It did not go under the name of Hunyadi?

A. No, never.

255 Q. Are there any other Hungarian bitter waters known to you which have been sold under names not employing Hunyadi or the name Janos in any connection whatever?

A. There was a Victoria water, Deak Ferenz, Franz Josef, and in former years Hildegarde.

256 Q. Can you state which of these springs were the oldest springs?

A. I think Deak Ferenz, Szechenyi, Hildegarde, and Aesculap. The latter, Aesculap, is still in the world's market.

257 Q. As I understand the situation, your father was not the first to bring Hungarian bitter water on the market, but there existed already other Hungarian bitter waters at the time he commenced to sell the Hunyadi Janos water, is that correct?

A. Yes, because the wells of Hildegarde and Szechenyi existed before my father bought the territory from which Hunyadi Janos water comes.

46 258 Q. Do you know how this was as to the spring called Deak Ferenz, was that older or younger than your father's spring?

A. I cannot say exactly whether it is older or not, but it is one of the oldest springs.

259 Q. Can you tell how the waters of these springs which you have now named were sold in the market, under what names or labels?

A. Under these names of the springs given by me.

260 Q. And under what labels?

A. Well, the oldest labels for these waters were quite small and I think of brownish color. I cannot describe them exactly.

261 Q. Each of them had a different label, had it?

A. No, the form of these labels were, I think, if not exactly the same, still they had the general characteristics.

262 Q. Was their general character similar to the red and white label adopted by your father and which you have already described?

A. No, it was not, and my father in order to distinguish his water from all the other waters adopted the present labels of a white paper with a red centre field.

263 Q. Is the Hildegarde water or the Deak Ferenz water, or any of those which you have now named, called Hunyadi water in the market, either here or abroad?

Objected to as calling for a conclusion.

A. No—well, I don't know exactly whether from the same wells, or from other wells which are quite near them, later the so-called Hunyadi Matyas water was taken.

264 Q. You mean that as to this water there is a possibility that it may be the same as one of the former spring waters which you have now mentioned?

A. That is, these springs were bought by the present proprietors of Hunyadi Matyas water in 1877.

265 Q. Do you mean all these springs, or only one of them?

47 A. As to that I cannot say exactly, but Deak Ferenz was bought by the proprietor of the Hunyadi Matyas water, and if I know well, it is even today brought in the market as Deak Ferenz water.

266 Q. Had the Victoria water ever been known in the market as a Hunyadi water?

A. No.

267 Q. Are there any other Hungarian waters besides those named by you which are sold either in Hungary or in this country, and which do not bear the name Hunyadi in any form?

A. I mentioned the Franz Josef and the Deak Ferenz, also the Hungaria water, and I think there were other waters, too, but I cannot remember them.

268 Q. These do not go by the name Hunyadi in this country?

A. No, and in fact at the present there isn't another water in Hungary which bears the name Hunyadi except the Hunyadi Janos.

269 Q. Was that owing to the efforts of Mrs. Emilie Saxlehner to stop the use of the word Hunyadi by other owners of springs?

Objected to as calling for a conclusion.

A. Yes, sir.

270 Q. Can you show us some specimens of bitter waters, not yours, as they are sold in the market, for the purpose of showing under what different bottles and styles of labels and capsules bitter waters are sold in the market of the United States?

A. I have here a bottle called Carabana, a Spanish bitter water, a bottle of Rubinat, a bottle of Saratoga Carlsbad, a bottle of Villacabras bitter water, and I know also of others, and here is also the Rakoczy bitter water, which comes from Germany.

271 Q. I notice that all of these bottles and labels are entirely different from your labels. Has that always been the case, so far as your knowledge goes?

A. Yes.

Complainant's counsel offers in evidence the four bottles presented by the witness, and the same are marked Complainant's Exhibit 11 (1, 2, 3, 4), other bitter waters.

48 Objected to as immaterial and irrelevant to the issues in this action, the waters not appearing to be Hungarian waters at all, but to come from other countries.

272 Q. You have been asked about the Hunyadi Arpad water and the Hunyadi Matyas water, and the other waters which have been sold in Europe and this country bearing the name Hunyadi in some connection or other; can you show under what labels these waters were sold, and if not from the beginning, still for some time past?

A. Yes, sir; I can.

273 Q. Please point out under what labels these waters were sold in Europe.

A. I herewith produce a sheet which has been marked Exhibit European Labels. This sheet does not contain a specimen of the Hunyadi Arpad labels, but I can say that the Hunyadi Arpad has exactly the same label as this on this sheet.

274 Q. You mean a label of red and white, with a portrait in the center and a general arrangement as in these labels?

A. Yes, sir.

275 Q. Can you point out a copy of the Hunyadi Matyas label as used for that water in Europe?

A. The earliest label on this sheet, which was used by Mattoni & Wille in about 1880, for one of the springs owned by that firm in Budapest, is called Mattoni Budai Kiraly Keserûviz. The label shows in small print on the white wings the name Hunyadi Matyas Quelle, which means Matyas spring. The label is the fifth from the top in the left-hand column of the exhibit. It has on it the picture of a king on horseback.

This label was followed by another used by the firm of Mattoni & Wille for the same water, which bears the name Hunyadi Matyas upon the red centre field, together with the portrait of a king. That is the second from the top in the left-hand column.

276 Q. Please state what you know about the label called
49 St. Stefan Bitter Quelle, in the right-hand column of the exhibit, being the second from the top?

A. This water belongs to the same man as the Hunyadi Matyas the firm of Mattoni & Wille, and is still on the market.

227 Q. Is it a different water from the Hunyadi Matyas?

A. I don't know, only the wells of Mattoni & Wille they are quite close together.

278 Q. I notice that this St. Stefan label does not bear on its face the name Hunyadi?

A. No.

279 Q. Can you state whether that water was known in Hungary or in Europe under the name of Hunyadi water?

A. No; it was known as St. Stefan and not as Hunyadi.

280 Q. Now, please state where these red and white labels were used?

A. They were used on the European continent, that is, everywhere we used our white label with red centre field.

281 Q. I notice that you have on the bottom of this sheet two Hunyadi Janos labels, do these represent different forms of labels used by your father or your mother in their business?

A. Yes; the upper one is one of our very old labels, and the lower one, which was in use since we had the contract with the Apollinaris Company, has a caution on the top of the label.

282 Q. And this caution was that the water so labeled was not to be exported to the United States or transmarine countries in accordance with your contract with the Apollinaris Company, is that correct?

A. Yes, sir.

283 Q. Now, please state whether you find also on this sheet a specimen of the Hunyadi Istvan label?

A. Yes, sir; right in the centre of the exhibit.

284 Q. And do you also find a specimen of the European label used for the Hunyady Lajos water?

A. Yes, sir; two labels on this card.

285 Q. Are they the same?

A. They seem to be substantially the same.

286 Q. Now, if I understand the situation correctly, these Euro-

pean labels were canceled in Hungary on account of their
50 similarity to the European label of Andreas Saxlehner?

A. Yes; they were, in 1894.

I forgot to mention that the Rakoczy Ferenz water, of which a specimen is shown in the right-hand column of the exhibit, being the fourth label from the top, was brought upon the market years ago in Hungary and Europe and sold in great quantities until about 1888. In 1888 this spring was bought by the Apollinaris Company, and the sale of this water was stopped, and in 1896 this Rakoczy Ferenz water was again brought upon the market under the name of Apenta Uj Hunyadi.

287 Q. Now, please state whether as long as the name of that water was Rakoczy Ferenz as stated on the label, the water was known or spoken of in Europe as Hunyadi water.

A. No; it was spoken of as Rakoczy Ferenz Hungarian bitters.

288 Q. Now, please state whether those of the labels on the exhibit which bear the word Janos, either alone or in other combinations, are also forbidden by the authorities in Hungary, nowadays?

A. Yes; they are.

289 Q. How could the use of the word Janos do any harm to complainant's business in selling her bitter waters?

Objected to as calling for a conclusion.

A. Because in the countries of the Latin races Hunyadi water is known as Eau de Janos and Aqua de Janos—that is, Janos water.

Complainant's counsel offers in evidence the sheet of labels produced by the witness, and the same is marked Complainant's Exhibit 12, European labels.

Defendant's counsel objects to the exhibit as immaterial and irrelevant, the labels shown in said exhibit appearing from the testimony of the witness to have been used only in continental Europe, and further objects to all the testimony given by the witness in regard to this exhibit and moves to strike out the same for the same reason.

51 290 Q. Now, I believe you have stated that when the contract with the Apollinaris Company was made, the color of your labels was changed to red and blue?

A. Yes, sir.

291 Q. And that was in 1876?

A. Yes, sir.

292 Q. Can you show how these several Hungarian waters, whose labels you have just explained, were sold in the United States of America after the blue and red label had been adopted by your father for that country?

Objected to as immaterial, except so far as the testimony may relate to the label used by defendant and alleged to be an infringement of complainant's label.

A. Until 1886 I think there was no water except ours which was sold here under the Hunyadi name. There was the Hunyadi

Matyas water, but this water, as I know, until 1886 was sold here under a red and white label, under the name of Mattoni's Royal Hungarian bitter water, and from 1886 it was sold as Hunyadi Matyas water under the same red and white label, and in 1890 it was changed to red and blue label and bore the name Hunyadi Matyas. Later after this date gradually other waters were commenced to be imported.

293 Q. Can you produce a sheet showing these various labels used by your competitors, together with some labels used by your father or your mother in their business, for the sake of comparison?

A. Yes; I can and do.

Witness produces a sheet of labels, and complainant's counsel offers the same in evidence, and the same is marked Complainant's Exhibit 13, American labels.

Objected to as immaterial.

294 Q. Can you state whether or not these competing blue and red labels have been canceled from the registry by the Hungarian minister?

A. Yes, sir; they have been cancelled in 1894 and 1896.

52 295 Q. I notice that this sheet also contains a blue and red label of the Hunyady Lajos water, signed "Sole agents for the United States and Canada, Bell, Pollitz & Co., New York;" has that label also been canceled by the Hungarian minister of commerce?

Objected to as immaterial.

A. Yes, sir; it has been in 1894.

296 Q. Can you state what the reason was that your father or your mother did not institute any suit earlier in this country to prevent the sale of these competing waters under labels like those produced by you?

Objected to as immaterial, incompetent and asking for the conclusion of the witness.

A. For two reasons. First, because my father was not able to protect his rights in Hungary on the grounds that there was no trade-make law which would have offered any protection: and, secondly, my father, and lately, Mrs. Emilie Saxlehner, were with the Apollinaris Company on very bad terms, having all the time litigations with the company, and therefore my father, as my mother, Mrs. Emilie Saxlehner, did not have the confidence to put such a matter in the Apollinaris Company's hands.

297 Q. Please state what difficulty had arisen between your father and the Apollinaris Company with reference to your registered trade-marks in England.

The same objection.

A. In England the Apollinaris Company registered the Hunyadi Janos name without my father's knowledge in that company's name, so that later my father had to have a proceeding instituted to cancel

that registration and cause the name to be registered in my father's name as proprietor.

53 298 Q. Was there a suit actually commenced by him against the Apollinaris Company for that purpose?

The same objection.

A. Yes, sir.

299 Q. Did you discuss these matters with your father and with your mother in Budapest at the time?

A. Well, I knew all these matters at the time, and later on I heard the conferences with our lawyers and so on which were held.

300 Q. At or about what year did this proceeding in England take place between your father and the Apollinaris Company?

A. It must have been perhaps eight years ago or thereabouts; I don't remember exactly the date at present, but I can ascertain the date later.

301 Q. Please state whether or not there were also other litigations between your father and the Apollinaris Company after they had entered into their contract in 1876.

A. Yes, sir; many other litigations.

302 Q. Were the friendly relations existing between Saxlehner and the Apollinaris Company disturbed by these litigations, or did they remain the same?

A. No; they were not on friendly terms.

Recross by Mr. MOODY:

303 X Q. You have referred to certain springs as being older than the springs from which your father drew his Hunyadi Janos water?

A. Yes, sir.

304 X Q. Do you know if the waters of any of those older springs were ever sold in the United States?

A. Not in the United States.

Examination closed.

Adjourned to Friday, July 2, 1897, at 11 a. m.

KÁLMÁN SAXLEHNER.

Subscribed and sworn to before me June 28, 1897.

——— ———.

54 NEW YORK CITY, *July* 2, 1897.

Hearing resumed.

Present: Counsel as before.

ADOLPHE DE BARY, being called as a witness on behalf of complainant, and having first been duly sworn, testifies as follows:

By Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.

A. Adolphe de Bary; 51 years old; importer; I am at present living in Summit, N. J.; I live part of the winter in New York city,

but I live most of the year in Summit, N. J. I am a partner of the firm of Frederick de Bary & Co.

2 Q. How long have you been a member of the firm of Frederick de Bary & Co. of this city?

A. About thirty years.

3 Q. Did your firm ever act as agents for the Apollinaris Company, Limited, in this city, for the importation and sale, amongst others, of Hunyadi Janos water?

A. Yes, sir.

4 Q. Please state during what years your firm acted as such agents.

A. I suppose from about 1877 until we gave up the agency in 1888.

5 Q. Can you point out the labels under which the Hunyadi Janos water was sold by your firm in this country? (Handing to witness Complainant's Exhibit Hunyadi Janos Labels Used in the United States.)

A. I believe we had those at first (pointing to the top label), white and red, and afterwards blue and red (like the second label from the top). There is our name printed across on the third label.

6 Q. Was that the way in which you sold the bottles for some years?

A. Yes, sir.

7 Q. Then, as I understand it, these three labels are the labels under which the water was sold in this country, which are known to you?

55 A. I believe that was the first label that we had (indicating); I am quite sure about these others.

8 Q. You mean the white and red label you believe to have been the first, and you are sure about the second and third label from the top?

A. Yes, sir.

9 Q. Will you please state whether that Hunyadi Janos water was sold in any considerable quantities in this country since 1877.

A. Yes; we sold very largely of it.

10 Q. How was the water known colloquially among the public?

A. A great many persons just called for "Hunyadi," and others "Hunyadi Janos water;" I suppose the majority called it "Hunyadi water."

11 Q. Did your firm receive any orders for the water under the name of Hunyadi water?

A. I believe so.

12 Q. Was there from 1877 until 1886, any other water in the market here with blue and red labels like the labels pointed out by you, or with names of which the word "Hunyadi" formed a part?

A. Several years after we brought out the Hunyadi Janos water, I believe Hunyadi Arpad water was introduced or sold here, but I am not sure when that was.

13 Q. You don't recollect the year?

A. No.

14 Q. Did the Apollinaris Company, or your firm, advertise the Hunyadi Janos water in this country?

A. Yes, very largely.

15 Q. Did that continue during the time that your firm exercised the agency for the Apollinaris Company?

A. Yes, sir.

16 Q. In what way was it advertised?

A. Newspapers, pamphlets, folders, show-cards, &c., &c.

17 Q. Did the Hunyadi Janos water become an important commodity in the market among bitter waters?

A. Yes, I suppose by all odds the largest; had the largest sale of any bitter water in the market.

56 Cross-examined by Mr. MOODY:

18 X Q. Referring to the exhibit labels used in the United States, as to which you have just testified, can you state during what years you sold this Hunyadi water under the red and white label?

A. I couldn't from memory, and I suppose it would be pretty difficult for me to ascertain, because when we gave up the agency I believe we turned over most of our papers to the Apollinaris Company.

19 X Q. But you did sell it under the red and white label?

A. I said I most positively did at first bring it out with the red and white label, but some little time afterwards, so far as I recollect, we changed to the blue and red label, and continued the blue and red label.

20 X Q. Can you state approximately how much of the waters you sold under this white and red label?

A. No, I could not. It is a great many years ago now.

21 X Q. Did you sell any of the Hunyadi water except as agents for the Apollinaris Company?

A. No.

22 X Q. You did not handle it in any other way?

A. No.

23 X Q. Did you ever have anything to do with other Hungarian bitter waters than that of the complainant?

A. The Friedrichshall bitter water, also handled by the Apollinaris Company—I believe they handle it now.

24 X Q. Do you know anything about other Hungarian bitter waters bearing the name "Hunyadi" being sold here during the time that you have spoken of?

A. I know the Apollinaris Company brought suit against the Hunyadi Arpad, and I am not sure whether another water came on the market at that time or not. I know of the Hunyadi Arpad, and so far as I recollect they got an injunction against them.

Defendant's counsel objects to the answer as incompetent,
57 and moves to strike out such part of it as states that a suit was brought and an injunction obtained against the Hunyadi Arpad water.

25 X Q. But you did not handle any of these waters yourself?
A. No, sir; none excepting Hunyadi Janos.

Examination closed.
(Sigature waived.)

Complainant's counsel offers in evidence a duly exemplified certificate (in translation) of the chief judge of the District Gesztes, dated August 22, 1892, relating to the Hunyady Lajos spring, and the same is marked Complainant's Exhibit 14, license certificate.

Objected to as immaterial and irrelevant to the issues in this case.

Complainant's counsel offers in evidence a duly legalized certificate of the district chamber of commerce and industry at Gyor, concerning the registration and cancellation of defendant's blue and red label, and the same is marked Complainant's Exhibit 15, certificate of registration and cancellation of red and blue Hunyady Lajos label.

The same objection.

Complainant's counsel also offers in evidence a duly exemplified certificate (in translation) of the chief judge of the District Gesztes, County Komaron, dated December 9, 1892, and the same is marked Complainant's Exhibit 16, certificate of new springs of Schmidthauer.

The same objection.

Complainant's counsel also offers in evidence duly exemplified copy (in translation) of certificate of the registry office concerning the Radetzky label of Louis Schmidthauer, and the same
58 is marked Complainant's Exhibit 17, Radetzky certificate.

The same objection.

Complainant's counsel further offers in evidence an exemplified copy certificate (in translation) of the municipal council at Buda, dated January 19, 1863, and the same is marked Complainant's Exhibit 18, 1863 certificate.

Complainant's counsel also offers in evidence a certificate of the Budapest chamber of commerce and industry concerning the registration of the trade-mark Hunyadi Janos on December 12, 1873, and the same is marked Complainant's Exhibit 19, certificate of 1891.

Complainant's counsel also offers in evidence a duly exemplified copy (in translation) of a certificate of the Budapest chamber of commerce and industry, certifying that no prior registration containing the word "Hunyadi" or "Janos" was had in Budapest, and the same is marked Complainant's Exhibit 20, certificate of 1892.

Adjourned to Friday, July 9, 1897, at 11 a. m.

NEW YORK CITY, *July* 9, 1897.

Met pursuant to adjournment.

Present: Mr. Antonio Knauth, of counsel for complainant, the examiner, and Mr. Tito Toscani, a witness on behalf of the complainant.

TITO TOSCANI, called as a witness on behalf of the complainant, and having first been duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.

A. Tito Toscani; age, twenty-seven; I reside at 327 Fifth avenue, and I am a salesman.

59 2 Q. State whether you know the Hunyadi Janos water sold by the complainant, and, if so, how long you have known the same?

A. Yes, I know Hunyadi Janos water, and have known it for the past ten years.

3 Q. Have you ever made any inquiries on behalf of the complainant, or on behalf of Mr. Kalman Saxlehner, complainant's manager in this city, respecting the condition of the market in this country as to the sale of Saxlehner's Hunyadi Janos water; if so, please state when and where you made such inquiries?

A. Yes; in July and also in September, 1896, I traveled through Pennsylvania, Ohio, Massachusetts and New York State. In those States I visited about two hundred druggists in the various cities I passed through, and made careful inquiries as to the Hunyadi Janos water of Mr. Saxlehner.

4 Q. Are you now in the employ of the complainant?

A. No.

5 Q. Were you at that time, that is, in July and September, 1896, specially employed by the complainant to make these inquiries?

A. Yes, sir.

6 Q. Have you any acquaintance with the defendant's Hunyady Lajos water, as it is sold in the market?

—. Yes, I have met with the water in the course of my inquiries.

7 Q. Now, please state what experiences you had in making these inquiries in July and September of last year?

A. I found that most of the druggists sold the Lajos water as genuine Hunyadi water, making a larger profit on the same, and being able to sell it at practically the same price, their customers not knowing the difference, owing to the similarity of the labels and the word Hunyadi.

8 Q. How did you ascertain that?

A. By inquiries at the drug stores which I visited.

9 Q. Did you also purchase or demand such water at such drug stores?

A. A few of them.

10 Q. State your experiences with reference to such demands which you made or purchases?

60 A. I visited the drug store of Flaks & Gordon, 40 Market street, New York city. I handed the druggist in charge a slip of paper with the words, "One bottle Hunyadi Janos." He took a bottle of mineral water out of his stock, and I heard him tear off something from the bottle, presumably the label. He thereupon

wrapped the bottle up, handed it to me, and demanded twenty-five cents for the thing. I paid this and took the bottle with me, and upon examination I found it to be a bottle of Hunyady Lajos water with a portion of the label torn off, leaving the word "Hunyady" and the letters "o s."

11 Q. Is the bottle which I now show you the bottle to which you have just testified?

A. Yes, sir.

Complainant's counsel offers in evidence the bottle referred to by the witness, and the same is marked Complainant's Exhibit 21 (T. T., No. 201).

12 Q. Can you state another such instance which happened to you?

A. On or about January 23, 1897, I went to the drug store of Paul Treutler, 2436 Second avenue, New York city, and demanded a bottle of Hunyadi Janos water, handing the druggist who was behind the counter a slip of paper with the words "One bottle Hunyadi Janos." The druggist took a bottle out of his stock, wrapped it up and handed it to me, for which I paid him twenty-five cents. I then asked him to please write the price and sign the slip that I had formerly given him, which he did. Upon leaving the store I unwrapped the bottle, and discovered that it was a bottle of Hunyady Lajos water.

13 Q. Have you had any other similar experiences in other drug stores?

A. Yes, quite a number.

14 Q. Can you state as to what is the general custom of druggists in the section of the country through which you traveled with reference to the sale of complainant's and defendant's waters?

A. I found that it was the smaller druggists that would usually sell the Hunyady Lajos water for the genuine Hunyadi
61 Janos. The old established houses and larger houses in the country would tell me that they only sold the genuine Hunyadi Janos, and would not have anything to do with the imitations, having known the Hunyadi Janos for from eighteen to twenty years.

15 Q. When speaking of such imitations, to what waters did the druggists refer?

A. The Hunyady Lajos, the Hunyadi Matyas, the Hunyadi Apenta, and several others with similar sounding names.

16 Q. Is the Hunyadi Apenta which you have mentioned the same water which is now sold under the name of Apenta, merely?

A. Yes, sir.

17 Q. State if you can at what prices the Hunyady Lajos water is sold by druggists to the public?

A. Varying from seventeen cents to thirty cents. I have seen it where they will sell it in Saratoga at thirty cents; they make out that it is the Janos and they will get anything that they can get for it. When it is sold for Janos, then it is sold at a high price, but when

a customer knows that it is an imitation they ask for the cheaper brand, and consequently get a lower price.

18 Q. Did you ascertain in your intercourse with the druggists whether or not the sale of the Hunyady Lajos water had had any effect upon the sale of the Hunyadi Janos water?

A. Yes, the sale of the Hunyadi Janos water had fallen off greatly, owing to the fact that there was very little profit to the druggist in the sale of Hunyadi Janos water, whereas they could buy the Hunyady Lajos water at very nearly half the price, and sell it at the same retail as the Janos sold for, people not knowing the difference, which an unscrupulous druggist would take advantage of.

TITO TOSCANI.

Direct examination closed.

Subscribed and sworn to before me July 9, 1897.

RICHARD P. MORLE, *Examiner.*

62 Complainant's counsel offers in evidence a certificate of the Budapest chamber of commerce and industry, dated August 29, 1896, relating to the transfer of the Hunyadi Janos trade-mark, registered on December 12, 1873, by Andreas Saxlehner to Emilie Saxlehner, the complainant, and the same is marked Complainant's Exhibit 22, transfer certificate.

Complainant's counsel also offers in evidence the certificate of the same chamber of commerce, dated May 10, 1892, relating to the transfer of the three labels bearing the name of the Apollinaris Company, as exporters, to the complainant, and the same is marked Complainant's Exhibit 23, label transfer certificate.

Complainant's counsel also offers in evidence a certificate of the mayor's office of Budapest, showing that the bitter water now sold by the complainant was brought into the market by Andreas Saxlehner in the year 1863, under the name "Hunyadi," and since 1865, under the name "Hunyadi Janos," and the same is marked Complainant's Exhibit 24, Hunyadi certificate.

Complainant's counsel offers in evidence a certificate of the mayor's office at Budapest relative to the ownership by Andreas Saxlehner of the bitter-water establishment "Hunyadi Janos" at Örsöd, and the same is marked Complainant's Exhibit 25, certificate of ownership.

Complainant's counsel also offers in evidence a certificate of the chamber of commerce and industry at Budapest, relating to the ownership of the firm Andreas Saxlehner by the complainant, and the same is marked Complainant's Exhibit 26, certificate of ownership of firm.

Adjourned to 2 p. m.

63 2 P. M.

Met as before.

WILLIAM STEMPEL, a witness called on behalf of the complainant, having first been duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. State your name, age, residence and occupation?

A. William Stempel; age 24. I reside at 236 East Eighty-first street, New York city; occupation, clerk.

2 Q. Where are you employed as clerk?

A. Findler & Wibel, 129 Nassau street, New York city, stationers.

3 Q. State whether you have known the complainant's Hunyadi Janos water, and if so, how long have you known the same?

A. Well, I have known it for probably a year past.

4 Q. Are you also acquainted with the defendant's Hunyady Lajos water?

A. I am acquainted with the water; yes, but not with the people themselves.

5 Q. You mean you do not know the defendant personally?

A. No.

6 Q. Have you ever at the request of the complainant's manager in this city, Mr. Kalman Saxlehner, made any inquiries among druggists in this city or elsewhere concerning the sale of the complainant's Hunyadi Janos water and also that of the defendant's Hunyady Lajos water?

A. Yes, I have been around the city somewhat, Brooklyn and the upper part of the State, Albany and Buffalo, and demanded Hunyadi water.

7 Q. Please state during what time you made these inquiries?

A. Since October, 1896, up to March, 1897.

8 Q. Did you do this continuously or at odd times at the request of Mr. Saxlehner?

A. I did it at different occasions.

64 9 Q. Please state in what manner you made these inquiries?

A. I went to drug stores and handed them slips demanding a bottle of Hunyadi Janos water, and I received Lajos and Matyas, and probably some others.

10 Q. Do you mean that in every instance you received Lajos or Matyas?

A. No, not in every instance, but the majority of them.

11 Q. Did you also demand Hunyadi Janos water by word of mouth without writing it down on a slip of paper?

A. Occasionally, yes.

12 Q. Can you state in what places you received the Hunyady Lajos or the Hunyadi Matyas when demanding Hunyadi Janos water?

A. I found that that would occur in the medium grades of drug stores, that is, what I mean, not so highly fitted out as the others;

if I went into a first-class drug store I would get a bottle of Janos upon asking for it.

13 Q. You mean that in the poorer quarters you were apt to get the imitations?

A. Yes, sir.

14 Q. Please state what you mean by the Hunyady Lajos water to which you have referred?

A. I mean bottles similar to the one before me, which is marked Complainant's Exhibit Defendant's Bottle.

15 Q. Did the bottles of Hunyady Lajos water which you obtained from the druggists in such a manner always bear the same label as the bottle now before you?

A. Yes, I never saw another label for that water; they were all alike.

16 Q. How as to the colors or shades of colors used on that label?

A. Well, I never took notice of any difference in them; they are all alike.

17 Q. Did you heretofore make any affidavit in this case against Alexander Nielsen?

A. Yes, sir.

18 Q. Do you recollect any particular instances in which you obtained at drug stores, either in this city or in Brooklyn, or in other cities of this State, Hunyady Lajos water when demanding Hunyadi Janos water?

A. Yes; the Wilson Drug Co., 33 Siegel street, Brooklyn; I went in there and handed him a slip stating that I wanted one
65 bottle of Hunyadi Janos and he gave me a bottle of Lajos and charged me fifteen cents.

19 Q. How did the druggist give you that bottle?

A. I simply asked him if it would take very long to prepare it, fix it up. He said, "No, you can take it with you," and he laughed at me. He took it from underneath the counter, wrapped it up and gave it to me.

20 Q. Did you always pay eighteen cents for it when you got a bottle of Hundady Lajos instead of a bottle of Hunyadi Janos?

A. No, it averaged between fifteen and twenty-five.

21 Q. Can you state in what instances you paid fifteen and in what instances you paid twenty-five?

A. No, that I couldn't say.

22 Q. Can you state any other instance where you went into a drug store and demanded a bottle of Hunyadi Janos, receiving a bottle of Hunyady Lajos therefor?

A. Yes, I went to a druggist by the name of M. Bilkis, 35 Rivington street, city of New York, and demanded a bottle of Hunyadi Janos.

23 Q. When was that?

A. That was on the 22d day of January, 1897. I handed the druggist in charge a slip of yellow paper on which I had previously written the words, "one bottle of Hunyadi Janos." The druggist

took down a bottle from a show-case, wrapped in yellow paper, and handed it to me, for which I paid him twenty cents.

24 Q. Did you get a receipt?

A. Yes, sir.

25 Q. What did you do with the receipt and the bottle?

A. Oh, no, this party refused to give me a receipt, he just marked the bottle or paper, I don't know which it was, "twenty cents," and I noticed a label on his counter, so I took that and pasted it on the bottle as evidence to show that the bottle came from there.

26 Q. Can you state any other instance?

A. Yes, E. Liebhoff's drug store, 136 Stanton street, New York city.

27 Q. When did you go to that drug store?

A. On the 18th day of February, 1897.

66 Q. And what did you do?

A. I demanded of the druggist in charge a bottle of Hunyadi Janos bitter water. He said, "You want bitter water?" To which I replied, that I wanted Hunyadi Janos. He thereupon took a bottle out of his stock and handed it to me, and said, "That is what you want." To which I replied, "I don't know anything about it." He thereupon wrapped the bottle up and demanded twenty cents for the same, which I paid. It was a bottle of Hunyady Lajos.

29 Q. Can you state any other instance?

A. T. W. Nellis, corner or North Pearl street and State, Albany, New York. I visited that drug store.

30 Q. When did you go to that drug store?

A. It was on the 28th day of February, 1897.

31 Q. Now, state what happened in that drug store?

A. I asked the druggist in charge of said store for a bottle of Hunyadi water. The druggist handed me a bottle of Hunyady Lajos, saying, "This is the genuine, this is the Janos." I asked him whether he had Matyas or any others, to which he replied that they were imitations, and that the Janos and Lajos were two brothers who were separated, and now had their own springs.

32 Q. Did you make any more calls at Albany for the same purpose?

A. Yes, I went to probably almost a dozen places in Albany.

33 Q. Can you state what your experience at other drug stores in Albany was?

A. On the same day I went to the drug store of J. S. Milerick, 220 South Pearl street, and demanded a bottle of Hunyadi water. The druggist handed me a bottle of Hunyady Lajos water, which I purchased. I asked him whether he had any others, to which he replied that this was the only kind which he kept, but that there were others in the market. Then he said that when he bought this of the agent about a year ago, the agent told him that his parties cleaned out all the others, and that was the only one in the market, and they had bought all the springs.

34 Q. To what agent did the druggist refer?

67 A. He didn't say. I tried to get it out of him but he wouldn't give the party away.

35 Q. To which water did he refer?

A. To the Hunyady Lajos.

36 Q. Did you also go to the store of Edward Brumaghim in Albany?

A. Yes, sir.

37 Q. Was that on the same occasion?

A. Same day; yes.

38 Q. Please state what you purchased there, and what was said by the druggist?

A. This was at No. 70 Madison avenue, Albany. I demanded a bottle of Hunyadi water of the druggist in charge. The druggist told me that he had two kinds, one at thirty cents and one at twenty cents; that he had the Hunyady Lajos and the Hunyadi Janos. I asked him whether the Hunyady Lajos was the genuine; to which he replied that they were all genuine, and that the Lajos came from the real spring of the Janos water.

39 Q. Which kind did he offer to you for thirty cents and which for twenty cents?

A. The Hunyadi Janos at thirty, and the Hunyady Lajos at twenty.

40 Q. Did any of the druggists visited by you inform you which of the waters sold by them were genuine and which were not genuine?

A. At the drug store of H. A. Sloan, No. 235 Main street, Buffalo, N. Y., I asked the druggist in charge what kind of Hunyadi water he had. He told me he had Hunyadi Janos and the Hunyadi Lajos. I asked him to give me a bottle of the Hunyady Lajos water, which he wrapped up. He said to me, "If you want the real genuine you want to take the Janos; this is not genuine."

At the drug store of R. K. Smither, No. 588 Niagara street, Buffalo, N. Y., I asked the druggist in charge of that store what kind of Hunyadi water he kept. He told me he had the Lajos, the Matyas and the Janos. I then asked him which was genuine, to which he replied, "Well, the Janos is the genuine; the others are not;" and added that he sold most of the Matyas.

68 41 Q. Can you give any other instance?

A. At the drug store called O'Brien's pharmacy, at the corner of Niagara and Eagle streets, Buffalo, I asked the druggist in charge for a bottle of Hunyadi water. He looked over his stock for a bottle of Hunyadi Janos water, which he did not find, and finally he brought me a bottle of Hunyady Lajos water. In doing this he asked me, "Do you want the genuine?" To which I answered, "What kind do you keep?" He said he had this Lajos water. I then said that this was not genuine; to which he replied, "No; but it is just as good as Hunyadi Janos." I thereupon purchased a bottle of the Hunyady Lajos water, for which I paid twenty-five cents.

42 Q. You have made a great many such purchases, have you not?

A. Oh, yes.

43 Q. Now, can you state from your experience on these occasions what the expressed opinion of druggists is in selling this Hunyady Lajos water?

A. Well, the opinion of most of them is that all these other waters outside of the Hunyadi Janos were imitations, and that the Hunyadi Janos was the genuine; but they have a demand for the others because it is a cheaper water, and that is the reason they must carry it in stock. If I should go to a high-class druggist and demand a bottle of Hunyadi Janos he would give it to me.

44 Q. In such a case you were always furnished the Hunyadi Janos?

A. Yes, sir; in most places.

45 Q. And how is it when you go into a high-class store and demand a bottle of Hunyadi?

A. They bring out the Hunyadi Janos.

WILLIAM STEMPLE.

Direct examination closed.

Subscribed and sworn to before me July 9, 1897.

RICHARD P. MORLE, *Examiner.*

Adjourned to Wednesday, July 14, 1897, at 11 a. m.

69 NEW YORK, *July* 14, 1897.

Met pursuant to adjournment.

Present: Counsel as before.

Defendant's counsel objects to Exhibit 21, offered by complainant, as immaterial, showing no deception of the public or of the witness and no confusion of names or labels.

It is agreed that this objection shall be deemed to be timely.

MARTIN HELDT, JR., a witness called on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.

A. Martin Heldt, Jr.; thirty-seven years old; druggist; 287 Delancey street.

2 Q. How long have you been a druggist in New York city?

—. For about twenty years.

3 Q. Do you know the complainant's bitter water, called Hunyadi Janos bitter water?

A. Yes, sir.

4 Q. How long have you been acquainted with that water?

A. About eighteen years.

5 Q. Have you sold it in the market?

A. Yes, sir.

6 Q. I show you a sheet, containing various labels, which has been offered in evidence here, and ask you to state under which of these labels you have known this Hunyadi Janos water here?

A. A blue label with the red center, and later on with a yellow diamond on it.

7 Q. How long have you known that water with this blue and red label which you have pointed out?

A. About eighteen years.

8 Q. Has the label always been the same, or substantially the same?

A. Yes, sir; with the exception of the yellow diamond, which was put on later.

70 9 Q. That yellow diamond to which you refer was a small label added to the blue and red label?

A. Yes, sir.

10 Q. At the time when you knew this Hunyadi Janos water first—about eighteen years ago—was there any other bitter water in the market here which bore a similar blue and red label?

A. Not to my knowledge.

11 Q. Under what name was this Hunyadi Janos water sold in the market?

A. "Hunyadi" or "Hunyadi Janos" they called for.

12 Q. It was called for by the public as "Hunyadi"?

A. Yes, sir; sometimes.

13 Q. And at other times?

A. Under "Hunyadi Janos."

14 Q. Did that continue to be the case all the time?

A. No; later on there were other waters introduced.

15 Q. I mean, did the public continue to call for the water under "Hunyadi Janos" or "Hunyadi"?

A. "Hunyadi water."

16 Q. And that is still its present name?

A. Yes, sir.

17 Q. Do you know whether or not the Hunyadi Janos water was advertised in this country, and to what extent?

A. It was advertised in some medical and pharmaceutical papers.

No cross-examination.

Examination closed.

(Swearing of witness and signature waived.)

JOHN R. AGNEW, a witness called on behalf of the complainant, having first been duly sworn, testified as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation?

A. John R. Agnew; 48 years of age; 522 West One hundred and forty-third street, New York city; occupation, accountant.

71 2 Q. Please state in whose employ you are as accountant?

A. House of Park & Tilford, 917 Broadway, New York city.

3 Q. How long have you been in the employ of Messrs. Park & Tilford?

A. About twenty years.

4 Q. Have you during that time come in contact with the complainant's Hunyadi Janos water?

A. Yes, sir.

5 Q. Have you been well acquainted with it?

A. I have passed invoices for payment for the goods purchased, and have frequently seen it.

6 Q. Can you state, by pointing out a label to us, in what way, or under what label, you first knew this water in this market?

A. We knew it by the name Hunyadi Janos, and the general appearance of the label; I couldn't say whether it was this color or that color, for instance.

7 Q. You mean you are in doubt whether it was the second or third on the sheet shown to you?

A. Yes, sir. We know it by the general appearance of the label and the name Hunyadi Janos.

8 Q. Now, speaking of the general appearance of the label, do you refer to the red and blue label on the sheet shown to you (counsel showing to witness Complainant's Exhibit Hunyadi Janos Labels Used in the United States)?

A. Yes, sir.

9 Q. Have you known this Hunyadi Janos water in this market always under the red and blue label?

A. Yes, sir.

10 Q. Have you at any time seen it under the red and white label on the top of this sheet?

A. I think not; I don't recollect seeing that.

11 Q. Please state whether or not at the time when you first knew this water in the market here there was any other bitter water on sale having a red and blue label similar to the one you have pointed out?

A. None that I have any recollection of.

12 Q. Under what name or names was this Hunyadi Janos water dealt in by your house?

A. "Hunyadi Janos" and "Hunyadi" and "Hunyadi
72 water," on calls for each of those names we supplied Hunyadi Janos.

13 Q. Has your firm of Park & Tilford dealt in this commodity extensively?

A. Yes, sir; quite largely.

14 Q. When seeing a bitter water having such a red and blue label, would you suppose is to be Saxlehner's Hunyadi Janos water?

A. We should understand it to be Hunyadi Janos.

15 Q. Is your house still doing business in selling this bitter water now?

A. Yes, sir.

16 Q. From whom do they get it?

A. From Andreas Saxlehner.

17 Q. From his branch in New York city?

A. From his branch in New York city.

18 Q. Has your house ever dealt in the defendant's Hunyadi Lajos water?
A. No.

No cross-examination.
Examination closed.

JOHN R. AGNEW.

Subscribed and sworn to before me July 14, 1897.
RICHARD P. MORLE, *Examiner.*

MAX WUSTROW, a witness called on behalf of the complainant, having first been duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. State your name, age, residence and occupation.
A. Max Wustrow; 84 Canal street; age, 40; pharmacist.
2 Q. How long have you been a druggist in New York city?
A. Seventeen years.
3 Q. How long have you been acquainted with the Hunyadi Janos water?
A. Ever since I have been in business, seventeen years.
4 Q. Have you bought and sold that water during that time?
A. Yes, sir.
73 5 Q. Under what label have you known this water to be sold in this market?
A. Under the red and blue label that is on the Hunyadi Janos water at present.
6 Q. How was that water called when you offered and sold the same to the public or when it was demanded by the customers?
A. "Hunyadi Janos."
7 Q. Was it also demanded by other names?
A. They might come in and ask for "Hunyadi water," but we knew that they meant "Hunyadi Janos."
8 Q. Is that still the case?
A. Well, it isn't so much so now, because when they ask for "Hunyadi water," we make the distinction to ask them what they want.
9 Q. What is the cause of that?
A. Because there are so many different kinds in the market.
10 Q. You mean there are different waters in the market now which also bear the name "Hunyadi"?
A. Yes, sir.
11 Q. And for that reason you ask now which "Hunyadi" the customer wants?
A. Yes, sir.
12 Q. At the time when you first knew this "Hunyadi Janos water," was there any other water in the market which bore the name of "Hunyadi" in any connection whatsoever?
A. Not to my knowledge.
13 Q. Was there at that time any other water in the market

which had a red and blue label substantially like the one described by you?

A. Not to my knowledge.

14 Q. So that at the time when you first knew of this water here, both the name and the label were characteristic for the Hunyadi Janos water?

A. Yes, sir.

Cross-examined by Mr. MOODY:

15 X Q. What different kinds of Hunyadi water do you now keep?

A. I keep the Hunyadi Matyas and the Hunyadi Janos.

16 X Q. Any other?

A. That is all—and a water called "Huniea," put up by Saxlehner.

74 17 X Q. What is this water "Huniea" put up by the complainant, do you know; is in a bitter water like the Hunyadi Janos?

A. I believe it is a bitter water similar to the Hunyadi Janos.

18 X Q. Do your customers ever ask specially for the Hunyadi Matyas?

A. No, sir.

Redirect examination by Mr. KNAUTH:

19 Q. Isn't it a fact that the Hunyadi Matyas water, as sold in this market, is also sold under a red and blue label closely resembling that of the Hunyadi Janos water?

A. Yes, sir.

20 Q. If the other Hungarian bitter waters now sold under the name of "Hunyadi Matyas" or "Hunyady Lajos," or similar names, were sold under different labels and different names, do you think that the public would take them?

Objected to as asking for a conclusion of the witness and incompetent.

A. I don't think so.

Examination closed.

MAX WUSTROW.

Subscribed and sworn to before me July 14, 1897.

RICHARD P. MORLE, *Examiner.*

JAMES POLLITZ, a witness called on behalf of the complainant, having first been duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.

A. James Pollitz; thirty years old; New York city; commission merchant.

2 Q. Have you ever dealt in mineral bitter waters?
A. Yes, sir.
3 Q. And how long?
A. About seven years.
75 4 Q. Are you acquainted with the Hunyadi Janos bitter water sold by the complainant here?
A. Yes, sir.
5 Q. How long have you known that water?
A. About the same time, about seven years; that is, in this country.
6 Q. Have you known it longer abroad?
A. Yes.
7 Q. Where?
A. Germany.
8 Q. Are you a German by birth?
A. Yes, sir.
9 Q. Will you state how long you have known the Hunyadi Janos water in Germany?
A. Perhaps twenty years, altogether.
10 Q. Do you know the defendant, Alexander Nielsen?
A. Yes, sir.
11 Q. How long have you known him?
A. About seven years.
12 Q. Were you ever in partnership with him?
A. Yes, sir.
13 Q. What was the name of the partnership?
A. Bell, Pollitz & Co.
14 Q. Of that firm the defendant was a member?
A. Yes, sir.
15 Q. When was that firm started, about what time?
A. 1891.
16 Q. What did the firm do?
A. Dealt in drugs and mineral waters.
17 Q. Did it import any bitter water into this country from Hungary?
A. Yes, sir.
18 Q. Will you state under what name and label that bitter water was imported by it?
A. Hunyady Lajos was imported under the red and blue label.
19 Q. Can you point out one of the labels to which you refer in your last answer?
A. Yes, sir; it is the third one from the bottom in the left-hand column of the sheet marked Exhibit 13, American labels.
20 Q. Is there such a person known to you as "Hunyady Lajos"?
A. No.
21 Q. That name was merely a fanciful name selected for the water?

Objected to unless the witness knows of his own knowledge as to the fact.

76 A. I think so.

22 Q. What do you know about the selection of this name and the selection of this label for this water imported by the firm?

A. About the label, we wanted to get a red and blue label; and about the name, we didn't care about the "Lajos," only the name "Hunyadi."

23 Q. Why did you care about the name "Hunyadi"?

A. There was a demand here for "Hunyadi" water.

24 Q. And was there a demand for bitter water under a red and blue label in this market?

A. Yes, there was only for the red and blue label.

25 Q. Had not that red and blue label been for many years identified with the Hunyadi Janos water of Saxlehner?

A. Yes, sir.

26 Q. Did you afterwards attend to the sale of this Hunyady Lajos water in this country?

A. Yes, sir.

27 Q. Were you familiar with the manner in which it was sold here?

A. Yes, sir.

28 Q. Can you state whether, if it had borne a different label and a different name, it would have been sold here to the extent to which it was sold?

Objected to as incompetent and as asking for a mere conclusion of the witness.

A. We wouldn't have taken up any other label.

29 Q. Why wouldn't you?

The same objection.

A. Because we would not think it was possible to get a large sale.

30 Q. Did you get large sales for this water?

A. Yes, sir.

31 Q. Was this Hunyady Lajos water extensively advertised by your firm?

A. No, sir.

32 Q. You were able to dispose of it without extensive advertising of the water?

A. Yes, sir.

Cross-examined by Mr. MOODY:

77 33 X Q. When you state that "we" wished to have a red and blue label, whom did you mean by we?

A. The partners.

34 X Q. You mean to testify then that the firm of Bell, Pollitz & Co. desired to deceive the public and palm off Hunyady Lajos as Hunyadi Janos?

A. No.

35 X Q. What do you mean?

A. We wanted to get a similar label because we thought people would object to any different color.

36 X Q. You wanted the word "Hunyadi" for the same reason?

A. Yes; people were acquainted with the name "Hunyadi" from the "Hunyadi Janos," and when they meant bitter water they asked for "Hunyadi."

37 X Q. You mean then that the word "Hunyadi" had already become a generic term for Hungarian bitter waters, and for that reason you in selling Hungarian bitter waters wished to use the name "Hunyadi"?

A. Yes.

38 X Q. Why did you wish to use the red and blue label?

A. For the same reason.

39 X Q. Because they had already become characteristic of all Hungarian bitter waters and the people would not recognize the water as a Hungarian bitter water unless it bore that label?

A. Yes, sir.

40 X Q. At that time there were various other Hungarian bitter waters in the market bearing the various names, such as Hunyadi Matyas, and others?

A. Yes, sir.

41 X Q. Did they all bear these red and blue labels?

A. All of those which got the larger sale.

42 X Q. Bore the red and blue label?

A. Yes, sir.

43 X Q. Were they generally called for under the name "Hunyadi" water?

A. Yes, sir.

Redirect examination by Mr. KNAUTH:

44 Q. Did all these other waters which went under the name of "Hunyadi" bear labels which were made in close imitations of Saxlehner's blue and red label?

Objected to as calling for a conclusion of the witness.

78 A. Yes, sir.

45 Q. You were acquainted with those other waters in the market?

A. Yes, sir.

46 Q. Is it not a fact that all these other waters were close imitations of the name "Hunyadi Janos" in different connections?

The same objection.

A. Of the name "Hunyadi."

47 Q. So that as I understand the situation, you found that the name and the label of the Hunyadi Janos water were largely imitated in this country, and your firm wanted to take advantage of the same situation and make the same profit which other men made under similar circumstances?

A. We didn't consider it an imitation; it looked very much like

it, but we didn't consider it an imitation because nobody objected to it.

Examination closed.

JAMES POLLITZ.

Subscribed and sworn to before me, July 14, 1897.
RICHARD P. MORLE, *Examiner.*

OTTO v. SCHRENK, called as a witness on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. State your name, age, residence and occupation?
A. Otto v. Schrenk; 22 years of age; I reside in New York city, and am a lawyer by profession.
2 Q. Are you connected with the office of Briesen & Knauth, complainant's solicitors?
A. I am.
3 Q. Did you mail a letter to the defendant on or about the 12th day of October, 1896?
A. I did.
4 Q. Will you produce the letter or a copy of it?
79 A. A copy of the letter mailed by me on that day reads as follows:

"Mr. Alexander Nielsen, 43 Broad St., city.

DEAR SIR: We are instructed by the firm of Andreas Saxlehner of Budapest, Hungary, to notify you that by selling and introducing into the market of this country certain bitter waters containing the name 'Hunyadi,' you have violated the trade-marks of said firm of Andreas Saxlehner and are still violating the same. The manner in which the labels of the bottles containing the term 'Hunyadi' are arranged by you, moreover, is in such close imitation of the genuine Saxlehner labels, that this notice is to apply not only to the term 'Hunyadi,' and to the term 'Hunyadi Janos,' but also to the general style of the labels employed by you.

Unless we learn within a week that you are ready to recognize the above-indicated rights of our client and ready to make restitution for past infringements of these rights, we will bring suit against you to restrain future infringements and to insure an accounting for the past.

Yours respectfully, BRIESEN & KNAUTH."

5 Q. Was there an answer received to this letter?
A. No, sir.

No cross-examination.
Examination closed.

OTTO v. SCHRENK.

Subscribed and sworn to before me July 14, 1897.
RICHARD P. MORLE, *Examiner.*

Adjourned to Thursday, July 15, 1897, at 11 a. m.

80 NEW YORK, *July* 15, 1897.

Met pursuant to adjournment.
Counsel present as before.

ALEXANDER NIELSEN, the defendant, called by the complainant, having first been duly sworn, testifies as follows:

Examined by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation?
A. Alexander Nielsen; age, 34; 595 Tenth street, Brooklyn; occupation, agent.
2 Q. Are you the defendant in this case?
A. I am.
3 Q. Please look at the bottle which has been marked Complainant's Exhibit Defendant's Bottle, and state whether or not the bitter waters sold by you at the time of the commencement of this action were sold in bottles and with labels and capsules, as appearing on that exhibit?
A. Yes, as far as I can see.
4 Q. How long did you continue to sell the bitter water imported by you in bottles and with labels of this kind?
A. I haven't got the exact date. I would have to refer for that. It is several months ago.
5 Q. Can you state in what month you ceased to sell bottles of this kind?
A. I don't know exactly. I started on the 18th of May, 1897, with the new label.
6 Q. And since the 18th of May, 1897, you have not sold any more bottles in the red and blue labels, as appearing on the exhibit?
A. I haven't sold any of that at all since that.
7 Q. Have you since the 18th of May, 1897, delivered any such bottles under orders previously taken?
A. No, I have not.
81 8 Q. Had you any such water in stock on that day—on the 18th of May, 1897?
A. No; none whatever.
9 Q. How are you doing your business; are you attending to the sales yourself, and to the collection of the receipts?

This question is objected to by defendant's counsel for the reason that, especially at this stage, the complainant has no right whatever to pry into the nature of the defendant's business, and the witness is instructed that if he sees fit he need not answer this question, as the subject-matter is utterly irrelevant, immaterial and incompetent.

A. That I decline to answer.
10 Q. When you testified that on the 18th of May of this year you had no such bottles in stock, did you mean to include that there were no bottles in stock over which you had sole control?
A. With this label, as exhibited here?
11 Q. Yes.
A. I meant that I didn't have a bottle of that in stock, not hav-

ing control of it or anything else, it was simply sold before that date.

12 Q. Was it also delivered before that date?

A. It was sold and delivered.

13 Q. Did you not deliver to Siegel-Cooper & Co. of this city a considerable quantity of bottles of that kind subsequent to May 18, 1897?

This question is likewise objected to, and the witness is instructed that he need not answer the question. The issue that we are trying here is whether the defendant at the date of the commencement of this suit infringed certain trade-marks and certain labels; and assuming that the court will eventually find that the defendant did at the commencement of the suit infringe, there may be an accounting, provided the inexcusable laches of the complainant has
82 not disentitled the complainant to an accounting; but in all events, at the present stage of the case, the complainant is not entitled to the information that he seeks to obtain, and the witness is instructed that if he sees fit he need not answer the question.

A. I have no objection to answering. I never sold Siegel-Cooper & Co. so far as I know. Probably if they have got any water they might have got it from another outside party.

14 Q. When you stated that on or about the 18th of May, 1897, you had changed your label, you referred to the color and style of the label only, and not to a discontinuance of the use of the name "Hunyady Lajos," is that correct?

A. That is correct, yes. I am still using the name "Hunyady Lajos" on the new label.

15 Q. Did you after the 18th of May, 1897, receive any bottles of bitter water bearing your former red and blue label?

This question is likewise objected to, and it seems quite evident that the complainant's attorney is trying to lay the basis for a new motion for a preliminary injunction, and he is not trying the issues in this case; and the witness is again instructed that unless he sees fit, he need not answer the question.

A. No, I did not receive any.

No cross-examination.

Examination closed (signature waived).

Complainant's *prima facie* proofs closed, subject to the introduction in evidence of the will of Andreas Saxlehner, deceased, or a certified copy thereof.

It is stipulated that defendant's counsel have an extension of thirty days from the 4th of August, 1897, to take defendant's proofs.

83 NEW YORK, *September* 3, 1897.

Met at the office of Briesen & Knauth, complainant's solicitors, No. 229 Broadway, New York city, in accordance with the notice

dated September 1, 1897, hereto annexed, and admission of service endorsed thereon.

Present: The examiner and Antonio Knauth, Esq., counsel for complainant.

Complainant's counsel states that by agreement with Mr. Moody, counsel for defendant, he produces a certified copy of the last will and testament of Andreas Saxlehner, deceased, in the German language, having annexed thereto a duly authenticated translation thereof into English.

The document is marked for identification, "Will of Andreas Saxlehner, Sept. 3, 1897, R. P. M., examiner." The document being very lengthy, complainant's counsel reads in evidence the following portions thereof:

"Testament—my last will. I make this present testament in perfect health, with full and entire consciousness of my own and independent will, without having by whomever been influenced in doing so, this present testament being the content of my own free will. * * * I herewith declare my beloved wife (Emilie) to be the successor of my firm, of my business establishment and of my business name. I transfer exclusively to my beloved wife all my rights concerning my 'Hunyadi Janos' bitter-water trade-mark, as well as those concerning the trade-marks 'Kossuth,' 'Arpad,' 'Hunyadi Janos,' 'Hunyadi Erzsebet;' further, the patents regarding my sawing machine and filling apparatus, together with all licenses of trading and selling. * * * 6. The state of my
84 fortune is as follows: All the movable and immovable assets which are under my management and in the property possession or copossession of which I am, whether they are written wholly or partly upon my name, or not written at all, especially the assets as hereunder specified, have been acquired during my present married life, half of which is the property of my beloved wife Emilie, in her quality of legal coacquisitor, while of the other half I dispose by this my present testament—these assets are the following: The house No. 3 Andrássy-ut in Budapest, all the real estates and building grounds in Köérberek (near Buda), together with all superedifications and appurtenances which shall be found on the same; the 'Hunyadi Janos' bitter-water spring grounds, together with the wells, premises, articles of investment and trade. * * * 11. The half part of the house No. 3 Andrássy-ut in Budapest, together with all movables of any kind therein contained and thereto belonging I bequeath to my beloved wife as her exclusive property. I wish this house to remain also in the future the establishment of the future business of the firm Andreas Saxlehner, and to be considered as a family property by the head of the family. * * * It is from the 'Hunyadi Janos' bitter-water spring grounds and their wells which by the selling of their bitter water have brought the incomes which are not to be misregarded; these incomes repose upon the undisturbed, indivisible and rational management, which latter, however, is only possible if the said immovables and the total establishments in Köérberek will not be divided but left in their present united state. Any division would be a devaluation of all the parts,

nor could any rivalry of any single coproprietor be either feasible
prosperous, and moreover it would annihilate the productivity
all the single interests. I consider it my duty to dispose
85 this place so that any division of the Köérberek immovab
and establishments should as much as possible be prevent
as well as regards the grounds themselves as the exploration there
* * * The undivided exploration of the selling of the produ
of the 'Hunyadi Janos' bitter-water springs, the exploration a
commercial realization of the produced bitter water shall, under t
sanction and consequences of the above disposition, remain unc
tailed in the hands of my beloved wife Emilie. * * *

Budapest, the 24th of November, 1887.

(Signed) ANDREAS SAXLEHNER

The present testament was regularly promulgated at the Budap
royal tribunal on this present day of 29th May, 1889.

(Signed) DR. JOSEPH KURTHY,
Clerk of the Royal Tribunal

(Signed) BOGISICH,
President of the Royal Tribunal

Read.

(Signed) FIESER.

I herewith certify that the foregoing copy is *is* literally confor
with the unstamped original filed under number 19369—188
the rolls of the Budapest royal tribunal, Budapest, the 10th Ju
1891.

(Signed) BELA GASZNER,
Royal Notary Public. [L. S.]

Complainant's counsel states that either party to this suit m
before the closing of the proofs, read in evidence such additio
portions of said last will and testament as may be deemed pertin
to the issues in this case.

Complainant's *prima facie* proofs closed.

86 United States Circuit Court, Eastern District of New York

EMILIE SAXLEHNER
vs.
ALEXANDER NIELSEN. } In Equity.

Testimony taken on behalf of the complainant in rebuttal, bef
Richard P. Morle, special examiner, at the office of Briesen
Knauth, complainant's solicitors, 229 Broadway, New York c
on the 9th day of December, 1897, at 11 a. m.

Present: Antonio Knauth, Esq., of counsel for complainant; S
Moody, Esq., representing Louis C. Raegener, Esq., of counsel
defendant.

It is agreed that the witnesses to be called at this session may
cross-examined by defendant's counsel if he considers it desira
hereafter, before complainant's testimony is closed, and for that p
pose they may be recalled by complainant's counsel.

ROBERT MACLEAN TAFT, called on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation?
87 A. Robert MacLean Taft; 26 years of age; I reside at 371 West End avenue, New York city; I am a physician and surgeon.

2 Q. How long have you been in active practice in this city?

A. Since May, 1894.

3 Q. And how long were you a student of medicine before that time?

A. Three years, or practically four.

4 Q. Do you know the water sold by the complainant, Emilie Saxlehner, under the name of "Hunyadi Janos" water, of which I now show you a bottle (handing witness Complainant's Exhibit Complainant's Bottle)?

A. Yes, sir.

5 Q. How long have you known this water in such bottles?

A. I have known the water for ten years—I have known of it since I was a boy.

6 Q. Under what name or names have you known this water?

A. Under the name of "Hunyadi" water, and "Hunyadi Janos."

7 Q. Have you prescribed the water to patients at all?

A. Yes, sir; very frequently.

8 Q. Whenever prescribing or purchasing "Hunyadi" water, what water do you expect to obtain?

A. The "Hunyadi Janos" water.

9 Q. Is this "Hunyadi Janos" water a well-known remedy?

A. Very well known, I think.

10 Q. Is it frequently prescribed by physicians?

A. Yes, sir.

11 Q. In what style of bottles, or under what labels, have you known this "Hunyadi" water?

A. I recognize it from the trade-mark and from the peculiar shade of blue and red of the label, and the shape of the bottle.

12 Q. You mean like the specimen which is before you?

A. Yes, sir; like the specimen.

13 Q. Have you ever known of any other water sold in this market under the name of "Hunyadi" in any connection whatever?

A. I have known of waters other than the "Hunyadi Janos," which have been called "Hunyadi," but very recently.

14 Q. Since when, or about what time?

A. Four or five months ago.

88 15 Q. Before that you did not?

A. No, before that when I ordered "Hunyadi" I expected to get "Hunyadi Janos." I was mistaken once, which educated me.

16 Q. How do you mean that you were mistaken once?

A. Well, while on a yacht I ordered half a dozen bottles of "Hunyadi" water, and after it had been taken some time I found that it

didn't have the proper effect, and then I looked at the bottle and found that it wasn't "Hunyadi Janos" water.

17 Q. Do you know what it was?

A. I don't recollect the other name of it; it was very much like that water, but it wasn't the identical water.

Direct examination closed.

Cross-examination reserved.

ROBERT McLEAN TAFT.

Defendant's counsel objects to that part of the testimony in which the witness states that he knows of no other water called "Hunyadi" water except that of the complainant, on the ground that it is merely negative testimony and not evidence.

AUGUSTUS CAILLE, called on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation?

A. Augustus Caille; I am forty-four years old; I am a physician; I live at 753 Madison avenue, this city.

2 Q. Are you a practicing physician in the city of New York?

A. I am.

3 Q. How long have you been practicing medicine here?

A. Twenty years.

4 Q. Will you please state shortly what experience you have had in the medical profession?

A. What experience?

89 5 Q. I mean what course of studies you have undergone.

A. I studied chemistry before I studied medicine; then in 1872 I began the study of medicine and graduated in medicine in Germany, and subsequently at Columbia college here in this city. I began the practice of medicine in this city in 1877, and I have held quite a number of appointments. I have been physician to the Eastern dispensary, to the German dispensary; I hold now the appointment of visiting physician to the German hospital, and also to the Post Graduate hospital of this city; I am professor of medicine in the Post Graduate medical school, and have one or two positions as consulting physician; I am consulting physician to the Red Cross hospital of this city, and to the Isabella home and hospital; then I have been chairman of one of the sections of the Academy of Medicine; I am a fellow of the Academy of Medicine; I am a member of the committee of hygiene of the New York County medical society.

6 Q. Have you in the course of your practice become familiar with the bitter water known as "Hunyadi Janos" water?

A. Well, I have used it and prescribed it ever since I have been in practice.

7 Q. For about how many years?

A. Fully twenty years.

8 Q. Under what name or names have you known this water here in the United States?

A. Under the name of "Hunyadi Janos."

9 Q. Have you known it also under another name?

A. I am not familiar with any other name but that.

10 Q. Whenever you prescribe a bottle of this water to your patients, do you do it orally or by a written slip?

A. Well, I ask them whether they know what "Hunyadi bitter water" is, and if they say they do, I tell them to get some; and if they say they don't, I put it down on one of my blanks.

11 Q. When you prescribe to one of your patients a bottle of "Hunyadi" water, what do you expect your patients to get?

90 A. I expect them to get "Hunyadi Janos;" usually if I write a prescription I put it down in that way.

12 Q. In what way?

A. "Hunyadi Janos."

13 Q. And when you speak of it you speak of it as "Hunyadi" or "Hunyadi Janos"?

A. Well, I suppose during the last six or eight years—or during the last four or five years—I may, in speaking of it, simply have used the term "Hunyadi." I know formerly I used the full term, and at the present time I use the full term when I write a prescription for it as a rule.

14 Q. Have you been familiar with the outward appearance of the bottles in which this water is sold in the market?

A. Yes, of course I have seen many bottles of "Hunyadi Janos."

15 Q. Have you known of any other bitter water in the market under the name of "Hunyadi" or Hunyadi in some other connection?

A. Well, I believe that on one or two occasions, bitter water that appeared to look differently from the "Hunyadi Janos" was sent to my office, but I couldn't make any positive statement about that, because I generally gave them away to somebody and paid no further attention to the matter, but I remember that on one or two occasions samples was sent to my office, that I do remember.

Direct examination closed.

Cross-examination reserved.

AUGUSTUS CAILLE.

JAMES HARVIE DEW, called on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.

A. James Harvie Dew; age 54; I reside at 252 West Fifty-fourth street; I am a physician.

91 2 Q. How long have you been practicing as a physician in the city of New York?

A. My private practice twenty-seven years, and hospital two years.

3 Q. Did you, during this time, become acquainted with the "Hunyadi Janos" water of the complainant?

A. Yes, sir.

4 Q. Have you used it or prescribed it?

A. Very frequently.

5 Q. When you prescribe it to patients how do you usually prescribe it?

A. I generally direct them to get a bottle of "Hunyadi Janos" water.

6 Q. You mean orally?

A. Generally orally; where a person is unable to remember it, I write the name down and they call for it at the drug store—simply write "Hunyadi Janos."

7 Q. Have you been acquainted with the style of bottles and labels under which this water is sold?

Objected to as incompetent and immaterial.

A. Yes, sir.

8 Q. What do you understand under the term "Hunyadi" water?

A. I understand the "Hunyadi Janos" water; that is simply a mineral water—Hungarian water—the action of which I understand and know, and which I prescribe under certain conditions.

9 Q. Has this water been known to you under the name "Hunyadi" water for any length of time, and, if so, can you state how long?

A. I think it is difficult for me to state how long; for a number of years; I don't recall from memory how long I have been using it; I don't know exactly how long it has been before my mind, but I have used it for a number of years.

10 Q. Can you state what the reputation of the water is among bitter waters?

A. It has a very excellent reputation both in the profession and among the laity, and having a good reputation and a reputation for its harmlessness and its efficacy, we have been led to prescribe it.

92

Direct examination closed.

Cross-examination reserved.

JAMES HARVIE DEW.

WILLIAM A. EWING, called on behalf of the complainant, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.

A. William A. Ewing; I am 55 years old; I reside at 134 West Fifty-eighth street; I am a physician.

2 Q. Are you a practicing physician in New York city?

A. I am, and have been since in 1869.

3 Q. Are you acquainted with the "Hunyadi Janos" water sold by the complainant, Emilie Saxlehner?

A. I am.

4 Q. How long have you been acquainted with that water?

A. Well, I can't remember how long, it seems to me as long as I have been in practice, almost, I can't remember when I haven't known it.

5 Q. Do you know the general aspect of the label and the bottle in which the water is sold?

A. I do.

6 Q. Have you always known it under that kind of label?

A. I have always known it under that dark-blue label.

7 Q. Under what name or names have you known this water to be sold in the market?

A. I have known it sold under the name of the "Hunyadi" simply, and also the "Hunyadi Janos," to be more explicit, but I have been accustomed to simply call it "Hunyadi" water, and in ordering it I tell people to get "Hunyadi" water, not always specifying the "Hunyadi Janos" water.

8 Q. Did you know of only one bitter water in the market called "Hunyadi"?

A. Yes, sir.

93 9 Q. So that whenever you prescribed "Hunyadi" water you meant to get "Hunyadi Janos" water?

A. Yes, sir.

10 Q. You have not been acquainted with any other water of a similar name?

A. No, sir.

11 Q. What is the reputation of the "Hunyadi Janos" water among other bitter waters?

A. Most excellent.

Direct examination closed.

Cross-examination reserved.

WILLIAM A. EWING.

Adjourned to Saturday, December 11, 1897, at 11 o'clock.

NEW YORK, *December* 11, 1897.

Met pursuant to adjournment.

Present: Counsel as before.

It is agreed between counsel that the swearing of complainant's witnesses, in rebuttal, is dispensed with.

MAX I. TRAUBE, called as a witness on behalf of the complainant in rebuttal, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation?

A. Max I. Traube; 35 years old; I reside at 761 Vanderbilt avenue, New York city; I am an agent.

2 Q. Are you acquainted with the business of selling mineral waters in this city, and if so, state how long you have been acquainted with that business?

94 A. I have been acquainted with that business ever since 1886.

3 Q. Please state in what way and how long?

A. I have been the agent, or connected with the Victoria natural mineral water, from 1886 until the first of January, 1897.

4 Q. Are you acquainted with the sales of natural bitter waters?

A. I am.

5 Q. Do you know the Hunyadi Janos water?

A. I do.

6 Q. State how long you have known that water?

A. For at least ten years.

7 Q. Are you acquainted with any other Hungarian bitter waters?

A. I am acquainted with quite a number of them.

8 Q. It has been claimed by some witnesses on behalf of the defendant in this case, that within a number of years past, all bitter waters imported from Hungary into this country have here been called "Hunyadi waters" and been sold as such; state whether or not that is true and in accordance with your experience?

Objected to as incompetent and speculative.

A. There are some waters known to me which have been imported here within the last ten years, which have not been called "Hunyadi water."

9 Q. Which waters do you mean?

A. One was called Victoria water, and I know of another called Franz Josef.

10 Q. Do you know a water called Hungaria bitter water?

A. I do not.

11 Q. Do you know a water which was at one time imported here called Hunyadi Joseph?

A. I do.

12 Q. Is this a bottle of it?

A. It is not, when I knew it.

13 Q. When did you know this Hunyadi Joseph water?

A. I knew it about five years ago.

14 Q. And how long did you know it—I mean on sale here?

A. About two years.

95 15 Q. Do you know whether that Hunyadi Joseph water is or was identical with the Franz Josef water which you have mentioned?

A. To my knowledge it was not, as both were imported about the same time.

16 Q. Is this a bottle of the Franz Josef water which you have mentioned?

A. It is a bottle of the Franz Josef.

17 Q. And that you say has not been called "Hunyadi" in this country?

A. Not to my knowledge.

18 Q. Under what name was it known and sold here?

A. Franz Josef water.

19 Q. Is that still on sale here?

A. To my knowledge, it is.

Complainant's counsel offers the bottle referred to in evidence, and the same is marked Complainant's Exhibit Franz Josef Bottle.

Objected to as immaterial, in that the bottle is not identified, the qualities of the water are not shown, and it does not appear whether it is a Hungarian water or Hungarian bitter water.

20 Q. Can you state whether or not this Franz Josef water is a Hungarian bitter water?

A. It is a Hungarian bitter water; I don't know whether I stated that or not, but it certainly was known as that.

21 Q. Have you known of a water, of which I show you a specimen bottle, called Royal Hungarian bitter water?

A. I have.

22 Q. When did you know that water?

A. As long as about eight years ago.

23 Q. Was that water ever known as a "Hunyadi" water?

A. Not to my knowledge.

24 Q. Under what name was that sold?

A. Mattoni's Royal Hungarian bitter water.

Complainant's counsel offers the bottle referred to in evidence, and the same is marked Complainant's Exhibit Mattoni's Bottle.

96 Defendant's counsel makes the same objection as that made to Complainant's Exhibit Franz Josef Bottle.

25 Q. How long have you known the Victoria bitter water which you mentioned?

A. I have known the Victoria bitter water for seven years.

26 Q. Imported into this country and sold here?

A. Imported into this country and sold here.

27 Q. Under what name was that water sold?

A. Victoria Hungarian bitter water.

28 Q. Was that called "Hunyadi" water?

A. It was not.

29 Q. Defendant's witness Haldenstein has mentioned that a water called Hunyadi Corvin was imported into this country some years ago and sold here; do you know anything about that water?

A. I do.

30 Q. Please state what you know about it.

A. At the time this water was imported I was employed by Erich Brunler, the importer. There were fifty cases of this water imported. Said Erich Brunler afterwards absconded and I was left in charge of the business. I afterwards tried to sell that water, but I found it very hard to do so.

31 Q. What difficulty did you encounter in selling this water?

A. Because we had a white and red label, and people wanted it under a red and blue label.

32 Q. You mean a label substantially like that of Saxlehner?

A. Similar to the Hunyadi Janos.

33 Q. Did you succeed in selling this Hunyadi Corvin water?

A. I sold a few cases of it.

34 Q. What did you do with the rest?
A. I traded it off for some other things I needed.
35 Q. Was that Hunyadi Corvin water ever advertised in this country in the daily papers?
A. It was not.
36 Q. Do you know whether or not the other bitter waters which were imported and bearing names employing the word "Hunyadi" in some connection—except of course the Hunyadi Janos—
97 were ever advertised in the daily papers in this country?
A. Not to my knowledge.
37 Q. Were they advertised in the trade papers, or some of them?
A. The only one I know was the Hunyadi Arpad.
38 Q. That was advertised in trade papers?
A. In one trade paper, to my knowledge.
39 Q. You have never seen any advertisements of any of those competing waters in the daily papers?
A. Never.

Cross-examination by Mr. MOODY:

40 X Q. Have you been the agent for the Victoria bitter water?
A. Not "bitter water," natural mineral water.
41 X Q. Have you been agent for any other Hungarian water or Hungarian bitter water?
A. Never.
42 X Q. You have stated that the exhibits Complainant's Exhibit Franz Josef Bottle, and Complainant's Exhibit Mattoni's Bottle are bitter waters imported from Hungary; how do you know this?
A. Because they were sold as bitter waters.
43 X Q. By whom?
A. The Mattoni was sold by Andre, I think his name was Joseph Andre; and the Franz Josef was sold in drug stores.
44 X Q. Did you ever yourself import or sell either of these waters?
A. Of which waters—of these two?
45 X Q. Yes.
A. No.
46 X Q. Have you ever had anything to do directly with the importation or sale of any of the other waters you have mentioned except the Victoria water and the Hunyadi Corvin?
A. I have not.

MAX I. TRAUBE.

Defendant's counsel moves to strike out the testimony of this witness in so far as it relates to any other water than the Victoria water and the Hunyadi Corvin as incompetent.

98 AEMILIUS J. R. MIELCK, called as a witness on behalf of the complainant in rebuttal, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.
A. My name is Mielck; I am 45 years old; I reside at 28 West Twenty-sixth street, New York city; I am book-keeper with Andreas Saxlehner,
2 Q. Have you made, in or about the month of May of this year, purchases of bottles of Hungarian bitter water?
A. I have.
3 Q. Can you state what such bitter waters you purchased then?
A. As far as I remember they were the Franz Josef and Victoria water and Hungaria water.
4 Q. By referring to Franz Joseph do you mean a bottle of bitter water similar to Complainant's Exhibit Franz Joseph Bottle?
A. Yes, I remember that.
5 Q. Where did you purchase these bottles of Hungaria water, Victoria water and Franz Joseph water; did you purchase them in drug stores?
A. Yes, in drug stores downtown, if I remember right. I couldn't state which brand I bought on Stanton street, or somewhere in that vicinity, and the Victoria I think I bought on Third avenue, uptown.
6 Q. Bought them all three in drug stores?
A. In drug stores; yes, sir.

Cross-examination by Mr. MOODY:

7 X Q. What was the occasion of your buying these three different waters—the reason why you bought them?
A. I wanted to buy them, that is all.
8 X Q. Under what names did you ask for them?
A. I asked for bitter water, Hungarian bitter water.
9 X Q. Did you ask for "Hunyadi" water simply, in any case?
A. No.
99 10 X Q. You did not ask in any case for "Hunyadi" water simply?
A. As far as I can remember I asked for Hungarian bitter water.
11 X Q. Without specifying what kind or brand of bitter water?
A. Probably I mentioned the brand; I don't remember exactly; it is so long ago, you know.
12 X Q. You are positive you did not ask for "Hunyadi" water simply?
A. I am positive I did not.

AEMILIUS J. R. MIELCK.

CHARLES A. KINCH, called as a witness on behalf of the complainant in rebuttal, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation.

A. Charles A. Kinch; I reside at 273 West Seventieth street, New York city; my age is 46; I am a physician.

2 Q. Are you a practicing physician in the city of New York, and if so, please state how long you have practiced medicine here?

A. I have practiced medicine since 1879 in New York. I graduated six years before that, and I practiced in New Jersey. I have been in practice twenty-five years.

3 Q. Have you during this time that you have been in active practice been acquainted with the Hunyadi Janos water of the complainant?

A. Yes, sir.

4 Q. Please state how long you have known of this water.

A. Oh, I don't remember. I suppose I have prescribed it about a dozen years.

5 Q. Have you prescribed it to patients?

A. Yes, sir.

6 Q. Are you still prescribing it?

A. Yes, sir.

7 Q. Under what name or in what manner do you usually prescribe it?

A. Hunyadi Janos.

100 8 Q. Have you ever used any other name for it or another shorter name?

A. Sometimes I call it "Hunyadi" water.

9 Q. When ordering a bottle of "Hunyadi" water what do you expect your patients to get?

Objected to as incompetent and immaterial.

A. Until eighteen months ago I expected them to get Hunyadi Janos always.

10 Q. And what happened about eighteen months ago which made you change in this direction?

A. I prescribed a bottle of "Hunyadi" water, and they were very intelligent people, and at my next visit they called my attention to the fact that they couldn't get Hunyadi Janos water, but they got Uj Hunyadi water.

11 Q. Did you see a bottle of this Uj Hunyadi water?

A. They showed it to me.

12 Q. Was that a bottle of the so-called Apenta water?

A. Yes, sir.

13 Q. Before that had you ever seen a bottle of Hungarian bitter water bearing the name "Hunyadi" in any other connection than Hunyadi Janos?

A. I don't remember any.

Cross-examination by Mr. MOODY:

14 X Q. Referring to this occurrence, which you stated happened about eighteen months ago, you said that you prescribed "Hunyadi" water simply in that case?

A. Yes.

15 X Q. Do you mean to state that the patient asked the druggist for "Hunyadi" water simply and received this Uj Hunyadi water?

A. I don't know what the patient asked the druggist. The patient was acquainted with "Hunyadi" water, and I didn't write the prescription; I wrote some other prescription, and I said, "You get also a bottle of 'Hunyadi' water."

16 X Q. Do you know how it came about that the patient received this bottle of Uj Hunyadi Janos?

101 A. I saw the druggist afterwards and he said you couldn't get Hunyadi Janos, but you could get Uj Hunyadi.

17 X Q. Did he state anything about being asked for "Hunyadi" water simply or Hungarian bitter water?

A. No, sir.

18 X Q. Did he state why it was that he handed out the Uj Hunyadi water instead of Hunyadi Janos?

A. No more than I have said.

19 X Q. The fact remains that there was a confusion and this change was made?

A. Yes, sir; the patient got what I did not expect her to get.

CHARLES A. KINCH.

GEORGE B. FOWLER, called as a witness for the complainant in rebuttal, being duly sworn, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Please state your name, age, residence and occupation?

A. George B. Fowler; I am 50 years old; I reside at 18 East Fifty-eighth street; I am a physician.

2 Q. Are you a practicing physician in the city of New York?

A. Yes, sir.

3 Q. How long have you been such practicing physician?

A. I graduated in 1871—that makes twenty-six years, about.

4 Q. Have you practiced ever since?

A. Yes.

5 Q. Have you ever occupied any public position here in the city of New York?

A. Yes, sir.

6 Q. Of what kind?

A. I have been, for eighteen years, I think it was, visiting physician to the New York infant asylum; connected with various dispensaries in my younger days; I have been for twelve years visiting physician to Bellevue hospital, professor of medicine in the Post Graduate medical school for many years, and I am at present health commissioner of the city of New York.

7 Q. Are you acquainted with the complainant's bitter water known as Hunyadi Janos water, as it is sold in the market here?

A. Yes, sir.

102 8 Q. Do you know the general style of bottle and label in which it is sold?

A. The general style; yes, sir; I would recognize it.

9 Q. Have you taken that water yourself or prescribed it?

A. Yes, sir; very frequently.

10 Q. How long have you known that water?

A. Well, I don't know exactly how long; I remember using it soon after I began to practice, seeing it advertised and having it presented to me by agents in my office.

11 Q. What is its position among bitter waters?

A. I think it ranks as high as any similar water in the market.

12 Q. What do you understand under the name "Hunyadi" water?

Objected to as immaterial.

A. I never knew exactly what it meant, I thought it was a Hungarian name.

13 Q. I mean what water do you understand under the name "Hunyadi" water?

A. I always thought it was the Hunyadi Janos, as the label described it.

14 Q. How long have you known the Hunyadi Janos water commonly under the name of "Hunyadi" water?

A. Well, I always thought the two names were right together; that they designated the water, and if you abbreviated it, perhaps you would call it "Hunyadi" water. I didn't know what the "Janos" meant either.

GEORGE B. FOWLER.

No cross-examination.

KALMAN SAXLEHNER, recalled as a witness for the complainant, in rebuttal, testifies as follows:

Direct examination by Mr. KNAUTH:

1 Q. Were you present during the examination of the witness Charles O. Weisz, a witness on behalf of the defendant, and did you hear his testimony?

A. Yes.

103 2 Q. Did you subsequently to the taking of his deposition go to the place of business of McKesson & Robbins to purchase some of the Hungarian bitter water to which Weisz had testified?

A. Yes, sir; I did, and I purchased such water.

3 Q. How did you ask for it?

A. As Hungarian bitter water.

4 Q. And what did you get?

A. I got a bottle of Hungarian bitter water, on top of the label of which was prominently written "Hungarian bitter water," and about in the middle part of the label the name "Victoria water."

5 Q. Please look at the bottle of Franz Josef water before you, which is marked Complainant's Exhibit Franz Josef Bottle, and also at the bottle of Hunyadi Josef water previously mentioned, which I now show you, and state whether or not the analyses of these two waters printed on the labels agree with one another?

Objected to as immaterial and irrelevant to the issues in this case.

A. No.

6 Q. What do you find the analysis of the Franz Josef to be according to the statement on the bottle?

Defendant's counsel makes the same objection to all questions on this subject.

A. On the Franz Josef water the sulphate of magnesium is in equal proportion with the sulphate of sodium; while on the Hunyadi Josef water the sulphate of magnesium is in larger proportion to the sulphate of sodium.

7 Q. What is the proportion of sulphate of magnesium to the sulphate of sodium on the Hunyadi Josef water?

A. 21.908 sulphate of magnesium to 17.355 of sulphate of sodium.

8 Q. Have you heard the testimony of Isidore Haldenstein as a witness on behalf of the defendants?

A. Yes, sir; I have.

104 9 Q. Have you known Haldenstein, and if so, how long?

A. Since I came to the United States, but I did not know him personally until I met him in the law suits and controversies.

10 Q. What position has M. Haldenstein assumed towards the interests of the complainants in this controversy?

Objected to as immaterial, the witness Haldenstein was sworn to tell the truth.

A. Hostile, not friendly.

11 Q. State whether the witness Haldenstein did any other acts in hostility to complainant's interests, if you know?

The same objection.

A. Well, I don't know whether he directly, or through some other persons, but I think he tried to make the impression upon the trade and public that "Apenta" would be "Hunyadi Janos," or as if the Hunyadi Janos would not be any more on the market, or that the Hunyadi Janos springs had been bought up by the Apollinaris Co. and brought as the Uj Hunyadi water on the market.

Objected to as speculative and incompetent.

12 Q. What is the Hungarian bitter water which the witness Haldenstein, as agent of the Apollinaris Co., introduced in this country under the name of Apenta Uj Hunyadi?

A. They were springs in former years called Rakoczy springs.

13 Q. In Hungary?

A. Yes; it belonged, I think, to a certain Loeser, and these springs have been bought up by one of the members or owners of

the Apollinaris Co., who formed the so-called Uj Hunyadi but which company was merely a creature of the Apollinaris Co., and they rebaptized these Rakoczy springs the Uj Hunyadi springs; and after the end of the contract between the Apollinaris Co. and Andreas Saxlehner, the Apollinaris Co. brought this water,
105 under the name Apenta water drawn from the Uj Hunyadi springs, in the market.

Question 12 objected to as immaterial.

14 Q. As I understand the situation, up to March, 1896, the witness Haldenstein had been instrumental in selling the Hunyadi Janos water, and after March, 1896, began to sell the Apenta Uj Hunyadi water; is that correct?

Objected to as immaterial.

A. Yes; that is correct, Mr. Haldenstein being the representative of the Apollinaris Co.

15 Q. Did you in the year 1896 bring a suit against the firm of Charles Graef & Co., who acted as local agents for the Apollinaris Co., to enjoin them from using the name Uj Hunyadi?

A. Yes, sir.

16 Q. Is that suit still pending?

A. Yes, sir.

17 Q. Did Mr. Haldenstein oppose the complainant's interests in that suit by affidavits or otherwise?

Objected to as immaterial.

A. Yes, sir; he did.

18 Q. Have you also since March, 1896, brought suits against other parties selling bitter waters in this market, which employed the same "Hunyadi" in some connection or other?

A. Yes, sir; we have.

19 Q. Is there now a suit pending in which you are seeking to enjoin the use of the name "Hunyadi Matyas"?

A. Yes.

20 Q. Have you also sued a number of retail dealers or druggists to enjoin them from palming off any of these competing waters employing the name Hunyadi as and for Hunyadi Janos?

Objected to as immaterial in this case, this being a trade-mark case, and such suits, if brought, appearing to be for unfair commercial methods.

106 Complainant's counsel replies that this line of testimony is elicited from the witness for the purpose of showing proper diligence on the part of the complainant in defending her trade-mark rights, and for no other purpose whatever.

Defendant's counsel states that he does not object upon that ground at all, and has not objected to this testimony as to former suits upon trade-marks.

A. We have.

21 Q. Please state whether or not the Hunyady Lajos water sold

by the defendant is of the same chemical constitution as the Hunyadi Janos water, if you know.

Objected to as incompetent, unless the witness knows of his own knowledge from an analysis of the same.

A. I see from the analysis given on the label of the Hunyady Lajos water that there is a great difference, so far that in the Hunyady Lajos water the sulphate of magnesium is stated to be in a much larger quantity or proportion than the sulphate of sodium, while in the Hunyadi Janos water these elements are about in the same proportion.

22 Q. How is the Hunyadi Janos water ordered from your firm by your customers—under what name or names?

A. Some under Hunyadi Janos, but in very many cases I receive orders only for "Hunyadi" water.

23 Q. Has that always been your business experience ever since the time that you opened the branch business of Andreas Saxlehner in this city?

A. Yes.

24 Q. And still continues to be?

A. Yes.

KALMAN SAXLEHNER.

(Complainant's proofs closed.)

107 COMPLAINANT'S EXHIBIT No. 4—Apollinaris Contract.

Authentic translation from the German language.

Between the Appollinaris Company, Limited, London, and Mr. Andreas Saxlehner, of Budapest, the sole proprietor of the "Hunyadi Janos" bitter water wells, the following covenant has been agreed to:

Mr. Andreas Saxlehner abandons to the Apollinaris Company the exclusive sale of his natural Hunyadi Janos bitter water in Great Britain, her colonies and dependencies, likewise so in all transmarine countries and places, Smyrna excepted, for a term of 10 say ten years. The prices are agreed to with a v. flor. 6 per case of 25 1/1 bottles,—flor. 10 per case of 50 1/2 bottles—flor. 22.50 per 100 1/1 bottles, (loose)—flor. 19 per 100 1/2 bottles loose; an abatement of 20% in goods; depart from Pest or Buda franco railway carriage or ship, choice of the Apollinaris Company. The goods travel at the risk of the Apollinaris Company, Mr. Andrew Saxlehner obliging himself to faultless bottling and good bottles, and to most careful package. Eight days after the receipt of the invoices the Apollinaris Company shall fulfil its payment through sight remittances upon Vienna under cash discount of 2%. In order that both parties may be preserved from excessive fluctuations in (discount) exchange they mutually agree that if at the day of arrival of a remittance meaning payment for water delivered the exchange for short London in Vienna would exceed 127%; the difference between 127% and the then effective exchange shall be compensated to Mr. Andrew Saxlehner by the Apollinaris Company; said com-

pensation ceasing altogether if Mr. Andrew Saxlehner raises his prices. And on the other hand should exchange sink below
108 100%, Mr. Andrew Saxlehner compensates the difference between 100 and the effective exchange up to 100%. Should Mr. Andrew Saxlehner through lack of water be compelled to raise his prices on the continent, the Apollinaris Company shall take part in the like increase, while in the opposite case, that is to say if Mr. Andrew Saxlehner should be induced to lessen his continental prices, the Apollinaris Company shall partake of the same reduction. And it is agreed to in general, that the Apollinaris Company enjoying the same prices as on the continent always receives an abatement of 10 in goods in preference to the continental buyers of Mr. Andrew Saxlehner. The expression "natural Hunyadi Janos bitter water" means that water, which Mr. Andrew Saxlehner draws from his springs situate in the neighborhood of Buda and without any preparation and treatment thereof and which he in the last years sent everywhere. Whole (1/1) and (1/2) half bottles are the bottles and pints now used by Mr. Andreas Saxlehner. The standard analysis of the supplies of Mr. Andreas Saxlehner shall be the analysis made by Professor Dr. Baron de Liebig under 19th of July, 1870, which is printed upon the label affixed to each of the bottles. According to it the water contains in 10,000 parts 160.158 sulphate of magnesia—0.849 sulphate of potash—159.148 sulphate of soda—13.050 chloride of sodium—7.960 soda-salt—9.330 carbonic lime—0.001 sillicic acid—0.042 alumina and sesquioxyde of iron—and 5.226 carbonic acid in free and half combined state. Upon the label the words: "Sole importers: The Apollinaris Company Limited, 19 Regent street, London, S. W." are to be printed. Regarding the United States it is agreed to, that the Apollinaris Company shall begin their trade only with the 1st of April, 1876, but on the other hand Mr. Andrew Saxlehner obliges himself henceforth not to accept orders arriving from the United States, but to make them over to the Apollinaris Company. And the Apolinaris Company oblige themselves not to raise
109 any competition to Mr. Andrew Saxlehner upon the continent. Mr. Andrew Saxlehner obliging himself on his part to make over to the Apollinaris Company all and any orders arriving from countries reserved to the Apollinaris Company, also to assist and support the company everywise with respect to said orders and besides to refuse altogether such orders whereof he knoweth or has good reason to suppose that, they are intended for countries reserved to the Apollinaris Company, also to make over such orders to the company. The Apollinaris Company have been made aware by Mr. Andrew Saxlehner that he has nominated and appointed an agent in Bavaria and another in Prussian Silesia, that is to say two agents, who enjoy a commission of 10%, furthermore there are one in Cologne and one in Wurtemburg with a 5% commission relating to orders obtained by them, besides that to several other larger purchasers a discount of 3 to 5% is conceded instead of the ordinary 2%. Now Mr. Andrew Saxlehner obliges himself to take care, that said preferences may neither directly nor indirectly injure the Apol

linaris Company. The Apollinaris Company oblige themselves to take yearly at least one hundred thousand half or entire bottles and give order therefor three months before the first of January of the year of delivery, at the latest. In the year 1878 a minimal quantity of one hundred and fifty thousand whole or half bottles must be taken, otherwise this present agreement becomes null and void. In such a case neither party shall be entitled to claim damages. The supplies are to be distributed in equal instalments during such months wherein the receipt of a large quantity is feasible. Each monthly instalment ought to be taken in due time and the Apollinaris Company shall be authorized to demand the delivery of two instalments at once. Should Mr. Andrew Saxlehner because of unavoidable obstacles (force majeure) lasting through a whole year be hindered from delivery, the Apollinaris Co. shall
110 only be authorized to withdraw from the continuation of these presents without any claim to damages. On the other hand should the Apollinaris Company by "force majeure" be hindered from taking any quantity of the water ordered, during a whole year, Mr. Andrew Saxlehner shall be entitled to withdraw from these presents likewise without any claim to damages. And if under said circumstances the parties should nevertheless adhere to this contract, then, for the term of suspension neither a subsequent delivery nor a subsequent receipt shall be claimed. In case of shorter suspensions an additional supply or additional acceptance may be claimed. The Apollinaris Company oblige themselves not to introduce nor to sell any other bitter water during the term of the present agreement. The present covenant begins with the 1st of January one thousand eight hundred and seventy-six, ending with 31st of December eighty-five (1885)—the Apollinaris Company being entitled six months before the expiration of these presents to prolong them for further five years and besides that the Apollinaris Company at any time shall be authorized to withdraw from the present agreement against previous twelve months' notice. All rights and obligations agreed to by these presents on behalf of or against Mr. Andrew Saxlehner are *per se* likewise stipulated for or against any of his successors in right, any present or future co-proprietor of the Hunyadi Janos springs, whosoever should either personally, or by other persons, by lease, by transfer or by sale, may in future work the Hunyadi Janos springs. Any contest arising shall be definitely settled by the board of arbitrators of the Vienna exchange under renouncement of any appeal both parties submitting to the respective award with such an effect as if it were brought at Budapest by the board of arbitrators of Budapest exchange or at London by the supreme court of judicature in England.

Given at Munich 14th of February 1876. Sig. Andreas
111 Saxlehner. In the presence of Herr Schultes as witness: (50 kreuz. stamp.) Sig. Aug. Schultes. For the Apollinaris Company Limited: Sig. E. Steinkopf. Sig. George Smith (L. S.) March 3, 1876. Witness to the signature of George Smith: Sig. William Howard, 15 Waterloo place, S. W. (L. S.)

Additional agreement to the covenant agreed to at Munich, 14th of February 1876 and London, 3rd of March 1876 between Mr. Andrew Saxlehner of Budapest and the Apollinaris Company Ld. London. The Apollinaris Company Ld. have been authorized by Mr. Andrew Saxlehner to prolong above agreement expiring 31st of December, 1885, for further fifteen years beginning with 1st of January, 1886 if said company makes use of above authorization by a declaration in due form and not later than 30th of June (1877) 1885. Budapest, 15th of February, 1877. Sig. Andreas Saxlehner. In the presence of Herr Augustus Schultes, as witness. Sig. August Schultes, London 19th of January, 1877. For the Apollinaris Company, Ld. Sig. George Smith (L. S.). Sig. E. Steinkopf. In the presence of William Howard as witness. Sig. William Howard (L. S.).

Budapest 15th of February 1877. To the Apollinaris Comp'y Ld., 19 Regent street London S. W. Conform- to the conference held with your Mr. Steinkopf I agree thereto that you undertake the sale of Friedrichshall bitter water. Respectfully Andreas Saxlehner m. p.

Budapest, 8th of February 1878. To the Apollinaris Comp'y Ld. London. By these presents I oblige myself to fill the orders
112 you shall address me always only out of those wells which regarding their contents in salt are the richest and I shall from time to time notify you of the specific weight of the waters I send you. This present obligation does not cancel the other covenanted stipulations concerning the quality of the water but increases only the force of the existing obligations. Sig. Andreas Saxlehner.

I, the undersigned John Douglas Newton, a notary public, duly admitted by royal authority practicing at London, do herewith certify, that at the request of the Apollinaris Company Limited I betook myself into said company's office N. 19 Regent street of this city, where I compared the paper-writing hereto annexed with the originals there presented me and found it a faithful copy thereof. Given at London, the ninth day of January, one thousand eight hundred eighty and five. *In testimonium veritatis.* Sig. J. Douglas Newton (L. S.).

No. 20 seen for legalization of above signature made by Douglas J. Newton sworn notary public of this place. From the imp. and roy. Austr. Hung. Consulate general London 9th of January 1885. Sig. Krapf (L. S.) due 1 fl. 5 kr. a. v.

Translated from the Hungarian.

(1 fl. stamp) 543/1885. I certify the present copy to be quite conform- to the legalized copy under no stamp presented to me by Dr. Maurice Mezei of Budapest advocate. Given at Budapest, fourth of March one thousand eight hundred eighty-five. Legalization 9 kr. stamp 1 fl. total 1 fl. 95. Sig. Dr. Weiser Karoly roy. not. publ. (L. S.)

113 (2 flor. stamp.) Fully conform with the authenticated copy kept in the clerk's office of the Budapest roy. court of com-

merce and exchange, Budapest 3d of February 1887. The clerk: Sig. Derse Mihaly (L. S.).

N. 121. This is to certify the signature of the court's clerk, Michael Derse, Budapest 4th day of February 1887. The presidency of the Budapest roy. court of commerce and exchange (L. S.) Csanady Gysiry m. p. president.

(N. 4849) I. M. 1887. This is to certify that above handwriting of George de Csanady the Budapest roy. court's of commerce and exchange's president and the common seal of above said court printed thereon are genuine, Budapest 5th of February 1887. By order of the minister of justice: Sig. Zador, counsellor of ministry (L. S.).

[SEAL.]

I, the undersigned roy. notary public and of the court of justice sworn English interpreter do herewith certify that having carefully compared the present English document with the German and Hungarian words of the deed hereto annexed now and under my interpreter's oath I do declare the former a faithful translation of the latter. Whereof an act being required, I granted these presents under my interpreter's seal and put my hand thereto. Budapest 5th of February 1887.

In fidem

[SEAL.] DR. CHAS. WEISER, *Not. Publ.*

114 COMPLAINANT'S EXHIBIT No. 18—1863 Certificate.

Translated from Hungarian.

Copy (1 fl. stamp). Official copy. 623/863. On the basis of the report of the town physician, stating that there is no objection against the analysis made of the chemical examination of the medicinal bitter water found on the Lágymányos by Andreas Saxlehner, permission is hereby granted to the said Andreas Saxlehner for selling the said medicinal water and salt and to give the spring the name of "Hunyadi spring," he being held to pay a sum of 15 florins for hospital purposes into the central cash office. Whereof notice shall be made to Andreas Saxlehner, to the central cash office and to the police office, while the report made on the 14th September 1862 of the chemical analysis shall be deposited at the archives. Passed in the meeting of the municipal council at Buda the 19th day of January 1863. Read and delivered. Ország Sándor, chief clerc. (1 fl. stamp).

I hereby certify that this copy is perfectly conform- with the original document deposited at the Metropolitan archives. Budapest 26th February 1885. Small Lajos, deputy archivary. (L. S.) 676. Received the sum of 60 kr. 26th February 1885—that is say 60 kreutzer. Signed Zachár Erdelyi Szimelly (L. S.).

No. 3050/896. I hereby certify that the foregoing copy is verbally conform- with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 23d October, 1896. Signed Dr. Hajós Béla Odon, substitute

appointed by decree No. 246/1896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Bela (L. S.).

No. 5376/96. Seen for the legislation of the foregoing signature and official seal of Dr. Hajós Béla Odon substitute of the
115 royal notary public Gaszner Bela, in virtue of sec. 67 of act 35 of the year 1874. Budapest the 24th October, 1896. The president signed Bogisics (L. S.).

No. 59697/96. Seen for legislation of the foregoing signature and the official seal of the president of the Budapest royal tribunal. Budapest the 26th October, 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert ministerial co-nsilor (L. S.).

(Stamp.)

No. 275/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text. Budapest the 10th November 1896.

IVAN BOSANYI, LL.D.,
Sworn Interpreter.

Hungarian certificate.
[SEAL.]

(Signature.)

The correctness — the opposite signature is hereby certified.
Wien, November 16, 1896.

Hungarian certificate.
(Signed) DR. ALEXY ALBERT.
[SEAL.]

By the chancellory of the imperial royal ministry of foreign affairs.
[SEAL.]

PILAT.

U. S. CONSULATE GENERAL
At Vienna, Austria, } ss:

I hereby certify that the foregoing signature of Pilat chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria-Hungary are genuine and entitled to full faith and credit.
Given under my hand and official seal this 16th day of November, 1896.
[SEAL.]

MAX JUDD,
U. S. Consul General.

Fee No. 1589.
Am't rec'd $2.50.

116 COMPLAINANT'S EXHIBIT No. 19—Certificate of 1891.

Translated from Hungarian.

Copy. The Budapest chamber of commerce and industry. No. 2622/1891. Certificates. (1 fl. stamp.) The undersigned chamber of commerce and industry hereby officially certify that a trademark entitled "Hunyadi Janos" has been on the 12th December

1873, registered under number 10 in the trade-mark register kept by the register office of the undersigned chamber for Andreas Saxlehner of Budapest, bitter-water spring proprietor, for the legal protection of the Buda bitter water sold by the said Andreas Saxlehner, and that previously to this registration no trade-mark has been registered for the protection of bitter water in the trade-mark register newly organized by this chamber in the year 1868. Budapest 8, August 1891. The Budapest chamber of commerce and industry. Signed Aebly vice-president. Signed Steinacker Odon secretary (L. S.)

No. 3024/1896. I hereby certify that the foregoing copy *is* verbally conform with the official copy stamped with 50 Kr. to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 22d October 1896. Signed Dr. Hajós Béla Odon substitute appointed by decree No. 246/1896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Béla (L. S.)

No. 5376/1896. Seen for the legalization of the foregoing signature and official seal of Dr. Hajós Béla Odon, substitute of the royal notary public, Gaszner Béla, in virtue of sec. 67 of act 35 of the year 1874. Budapest the 24th October 1896. The president. Signed Bogisics (L. S.)

No. 59697/1896. Seen for the legalization of the foregoing signature and the official seal of the president of the Budapest royal
117 tribunal. Budapest the 26th ——, 1896. For the royal Hungarian minister of justice: Signed Dr. Alexy Albert ministerial counsilor (L. S.)

(Stamp.)

No. 275/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto annexed original Hungarian text.

Budapest the 10th November, 1896.

IVAN BOSANYI, LL.D.,
Sworn Interpreter.

(Hungarian certificate.)
[SEAL.]
(Hungarian certificate.)
[SEAL.] (Signed by) DR. ALEXY ALBERT.

The correctness of the foregoing signature is hereby certified.

Wien, November 16, 1896.

By the chancellory of the imperial royal ministry of foreign affairs.

[SEAL.] PILAT.

U. S. CONSULATE GENERAL
At Vienna, Austria, } ss:

I hereby certify that the foregoing signature of Pilat chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria-Hungary are genuine and entitled to full faith and credit.

Given under my hand and official seal this 16th day of November, 1896.

MAX JUDD,
U. S. Consul General.

[SEAL.]

Fee No. 1594.
Am't rec'd $2.50.

118 COMPLAINANT'S EXHIBIT No. 20—Certificate of 1892.

Translated from Hungarian.

Copy No. 1801/1892 certificate (1 F. stamp) The Budapest chamber of commerce and industry hereby officially certify that a trade-mark entitled "Hunyadi Janos" has been on the 12th December, 1873, registered under number 10 in the trade-mark register kept by the register office of the undersigned chamber for Andreas Saxlehner bitter-water spring proprietor of Budapest for the legal protection of the Buda bitter water sold by the said Andreas Saxlehner and it is further certified that previously to that registration no such trade-mark was entered into the trade-mark register of this chamber in which the name or title "Hunyady" or "Hunyadi" or "Janos" was contained. Budapest 12, May 1892 The Budapest chamber of commerce and industry.

Signed Wahrman president. Signed Fritz Peter secretary (L.S.)

No. 3053/1896. I hereby certify that the foregoing copy is verbally conform with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 23d October, 1896. Signed Dr. Hajós Béla Odon. Substitute appointed by decree No. 246/1896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Béla (L.S.)

No. 5376/1896 Seen for the legalization of the foregoing signature and official seal of Dr. Hajós Béla Odon substitute of the royal notary public Gaszner Béla, in virtue of sec. 67 of act 35 of the year 1874. Budapest the 24th October, 1896. The president. Signed Bogisics (L. S.)

No. 59697/96. Seen for the legalization of the foregoing signature and the official seal of the president of the Budapest royal
119 tribunal. Budapest the 26th October, 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert ministerial co-nsilor. (L. S.)
(Stamp.)

No. 275/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation is in every respect conform with the hereto annexed original Hungarian text.

Budapest the 10th November 1896.

(Signature) IVAN BOSANYI, LL.D.,
[SEAL.] *Sworn Interpreter.*

(Hungarian certificate.)

Hungarian certificate signed by
[SEAL.] DR. ALEXY ALBERT

The correctness of the foregoing signature is hereby certified.
Wien, November 16, 1896.
By the chancellory of the imperial royal ministry of foreign affairs.
PILAT.
[SEAL.]

U. S. CONSULATE GENERAL } ss:
at Vienna, Austria, }

I hereby certify that the foregoing signature of Pilat chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria Hungary are genuine and entitled to full faith and credit.
Given under my hand and official seal this 16th day of November 1896.
[SEAL.]
MAX JUDD,
U. S. Consul General.

Fee No. 1581.
Am't rec'd $2.50.

120 COMPLAINANT'S EXHIBIT No. 22—Transfer Certificate.

Translated from Hungarian.

Duplicate. The trade-mark registry office of the Budapest chamber of commerce and industry certificate (stamp 1 florin). The undersigned registry office hereby certifies that the trade-mark annexed on the other side was on the fourteenth day of July in the year eighteen hundred ninety, at twelve o'clock noon, in accordance with the II law of the year 1890 and S. 17 of the XX law of the year 1878, and on payment of 5 florins registration fee, entered in the trade-mark register sub No. 121 on behalf of Mrs. Emily Pelikin, widow of Andreas Saxlehner, Budapest bitter-water-spring owner, for the legal protection of "Hunyadi Janos" Buda bitter water brought into commerce by the said spring-owner, with the remark that the trade-mark is employed as label on the bottles. Budapest, 29th August, 1896. The trade-mark registry office of the Budapest chamber of commerce and industry. Sigismund Liebstein, office manager and cashier Julius Makovetz, assistant clerk to the chamber and registrar, (L. S.). This trade-mark is a renewal of the trade-mark registered for Andreas Saxlehner on December 12th, 1873 sub. No. 10 and transferred to the name of Mrs. Emily Pelikan widow of Andreas Saxlehner on June 23rd, 1889, Budapest, 29th August, 1896. Julius Makovetz m. p. assistant clerk to the chamber and registrar (L. S.). It is certified that the signatures visible on the present trade-mark registration certificate are those of Sigismund Liebstein, office manager and cashier to the chamber and of Julius Makovetz assistant clerk to the chamber and registrar of trade-marks. Budapest 26th March, 1897. The Budapest
121 chamber of commerce and industry. Hüttl m. p. vice-president, Peter Fritz m. p. secretary (L. S.). No. 21323/97 (Stamp 1 florin.)

I hereby legalize the signatures of Theodore Hüttl and Peter

Fritz, vice-president and secretary respectively of the Budapest chamber of commerce and industry. Budapest, April 2nd, 1897. Tichtl m. p., ministerial councillor. (L. S.) (The label annexed to this certificate is a red and white Hunyadi Janos label as used on the continent of Europe.)
(Stamp.) No. 130/1897.

I the undersigned sworn interpreter do hereby certify that the foregoing translation is in every respect conform- with the hereto annexed original Hungarian text.
Budapest, the 19th May, 1897.

IVAN BOSANYI, LL. D.,
Sworn Interpreter.

[SEAL.]

N. S. No. 189
1897

UNITED STATES CONSULATE,
BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal court of commerce, and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the [SEAL.] 24th day of May, 1897.

FRANK DYER CHESTER, *Consul.*

122 COMPLAINANT'S EXHIBIT No. 23—Label Transfer Certificate.

Translated from Hungarian.

The trade-mark registry office of the Budapest chamber of commerce and industry. Duplicate. Certificate. (Stamp 1 florin.) The undersigned registry office hereby certifies that at the request of Louis Richter, as legalized attorney of Mrs. Emily Pelikan, widow of Andreas Saxlehner, Budapest bitter-water-spring owner, the three trade-marks annexed on the other side were, on the fourteenth day of July in the year eighteen hundred and ninety, at twelve o'clock noon, in accordance with the II law of the year 1890 and sec. 17 of the XX law of the year 1878 respectively and on payment of 15 florins registration fee entered in the trade-mark register sub. Nos. 127, 128 and 129 for the legal protection of the "Hunyadi Janos" Buda bitter water brought into commerce by the said owner, with the remark that the trade-marks are employed as labels on the bottles. The present trade-marks transferred to the name of Mrs. Emily Pelikan widow of Andreas Saxlehner on June 23rd 1889 were originally registered for Andreas Saxlehner on December 30th 1884 sub Nos. 1028, 1029 and 1030. Budapest, 10th May, 1892. The trade-mark registry office of the Budapest chamber of commerce and industry. Heller, m. p. (L. S.) It is certified that the signature visible on the present trade-mark registration certificate is

that of Arminius Heller official of the chamber and formerly registrar of trade-marks. Budapest 26th March 1897. The Budapest Chamber of Commerce and Industry. Hüttl m. p. vice-president, Peter Fritz m. p. secretary (L. S.) No. 21323/97. I hereby legalize the signatures of Theodore Hüttl and Peter Fritz vice-president and secretary respectively of the Budapest chamber of commerce
123 and industry Budapest 2nd April, 1897. Tichtl m. p. ministerial councillor. (L. S.)

(The three labels annexed to this exhibit are the red and white Hunyadi Janos label with the inscription of the Apollinaris Co. Ltd. as sole importer.

A red and blue Hunyadi Janos label with a similar inscription of the company as sole exporters.

And another red and blue label of the same kind with an additional script of Fred'k De Bary & Co. on the wings.)

(Stamp.)

No. 130/97. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text.

Budapest the 19th May, 1897.

IVAN BOSANYI, LL. D.,
Sworn Interpreter.

[SEAL.]

UNITED STATES CONSULATE,
BUDAPEST, HUNGARY.

N. S. No. 187/1897.

I, Frank Dyer Chester, consul of the United States of America at Budapest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal court of commerce and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the

[SEAL.] 24th day of May, 1897.

FRANK DYER CHESTER, *Consul.*

124 COMPLAINANT'S EXHIBIT No. 24—Hunyadi Certificate.

Translated from Hungarian.

Copy. The original provided with a one-florin stamp. No. 15565/961. Official certificate. The districtual mayor's office hereby certify upon request of Emily Pelikan widow of the late Andreas Saxlehner that it was her deceased husband, the founder of the firm Andreas Sexlehner, who already in the year 1862 gave the name "Hunyadi" and since 1865 the name "Hunyadi Janos" to the bitter water and bitter-water products by him produced and by that name brought them into commerce so that water brought into trade by the petitioner's late husband and since his death, viz., since the year 1889, by the petitioner herself was always and still is marked

by the name "Hunyadi" and "Hunyadi Janos" respectively. Budapest the 2nd October, 1896. The mayor's office of the 1st district. Signed Paul Olhauser mayor.

No. 3059/1896. I hereby certify that the foregoing copy *is* verbally conform with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 23*th* October 1896. Signed Dr. Hajos Bela Odon substistute appointed by decree No. 246/896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Bela (L. S.)

No. 5466/1896. Seen for the legalization of the foregoing signature and official seal of Dr. Hajos Bela Odon substitute of the royal notary public Gaszner Bela, in virtue of sec. 67 of art. 35 of the year 1874. Budapest, the 30th October 1896. The president signed Bogisics. (L. S.)

No. 60771/1896. Seen for the legalization of the foregoing signature and the official seal of the president of the Budapest
125 royal tribunal Budapest the 2*th* November 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert ministerial co-nsilor. (L. S.)

(Stamp.)

No. 275/1896. I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto-annexed original Hungarian text. Budapest the 10th November 1896.

[SEAL.] IVAN BOSANYI, LL. D.,
Sworn Interp-eter.

The genuineness of the foregoing signature is hereby certified, Vienna, November 16, 1896, by the chamber of the imperial and royal ministry of foreign affairs.

[SEAL.] PILOT.

U. S. CONSULATE GENERAL, } *ss:*
At Vienna, Austria, }

I do hereby certify that the foregoing signature of Pilot chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria-Hungary are genuine and entitled to full faith and credit.

Given under my hand and official seal this 16th day of November, 1896.

[SEAL.] MAX JUDD,
U. S. Consul General.

126 COMPLAINANT'S EXHIBIT No. 25—Certificate of Ownership.

Translated from Hungarian.

Copy. (1 fl. stamp.) No. 10570/1888. Official certificate. On basis of the official researches as well as of the lists kept at the district mayor's office it is hereby certified that the bitter-water spring establishment situated in this district in that part thereof which is called Koérberck Örsöd and which is the property of

Andreas Saxlehner, ever since the year 1865 is denominated by the name Hunyadi Janos both in general commerce and before public authorities and that it bears this name ever since the just-said date. Budapest 20 October 1888. The mayor's office of the 1st district Nr. 1786/108. The sum of two florins was paid in. Signed: Osztoics, mayor. Signed Dr. Komlody, deputy notary (L. S.).

No. 3045/1896. I hereby certify that the foregoing copy *is* verbally conform with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 23*th* October 1896. Signed Dr. Hajòs Béla Odon substitute appointed by decree No. 246/96 of the Budapest chamber of royal notaries of the royal notary public Gászner Béla (L. S.).

No. 5376/1896. Seen for the legalization of the foregoing signature and official seal of Dr. Hajòs Béla Odon substitute of the royal notary public Gászner Béla, in virtue of S. 67 of art. 35 of the year 1874. Budapest the 24th October 1896. The president. Signed Bogisics (L. S.).

No. 59697/1896. Seen for the legalization of the foregoing signature and official seal of the president of the Budapest royal tribunal Budapest the 26th October 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert, ministerial councillor (L. S.).

127 (Stamp 1 fl. No. 275/1896.) I the undersigned sworn interpreter do hereby certify that the foregoing translation is in every respect conform- with the hereto-annexed original Hungarian text.

Budapest the 10th November 1896.

IVAN BOSANYI, LL. D.,
Sworn Interpreter.

[L. S.]

The genuineness of the foregoing signature is hereby certified. Vienna, November 16, 1896. By the chamber of the imperial and royal ministry of foreign affairs.

PILOT.

[SEAL.]

U. S. CONSULATE GENERAL } *ss:*
at Vienna, Austria, }

I hereby certify that the foregoing signature of Pilot, chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria Hungary are genuine and entitled to full faith and credit.

[SEAL.] Given under my hand and official seal this 16th day of November, 1896.

MAX JUDD,
U. S. Consul General.

Fee No. 1569.
Am't rec'd $2.50.

COMPLAINANT'S EXHIBIT No. 26—Certificate of Ownership of Firm.

(Translated from Hungarian.)

No. 8931/96 certificate. The undersigned chamber of commerce and industry hereby does certify upon request of Mrs. Andreas Saxlehner *née* Emily Pelikan as proprietor of the Budapest registered firm Andreas Saxlehner that it appears from the official documents filed with this chamber that the petitioner's late
128 husband Andreas Saxlehner as founder of the firm Andreas Saxlehner has as early as 1863 provided with the name "Hunyadi" and since the year 1865 with the name "Hunyadi Janos" the bitter water and bitter-water products which he produced and brought them into commerce under the same names, and it is further certified that this vater, brought into commerce by the late Andreas Saxlehner and since his death that is to say since 1889 by the widow of Andreas Saxlehner *née* Emily Pelikan as owner of the firm Andreas Saxlehner, has always been designated by the name "Hunyadi" and "Hunyadi Janos" respectively and is still called by the said name. Budapest 6, October 1896. The Budapest chamber of commerce and industry. Signed Laneczy president. Signed Fritz Péter secretary.

No. 3057/1896. I hereby certify that the foregoing copy is verbally conform- with the official copy stamped with one florin to me exhibited by the Budapest registered firm Andreas Saxlehner. Budapest the 23*th* October 1896. Signed Dr. Hajos Bela Odon substitute appointed by decree No. 246–1896 of the Budapest chamber of royal notaries of the royal notary public Gaszner Bela. (L. S.)

No. 5376/1896. Seen for the legalization of the foregoing signature and official seal of Dr. Hajos Bela Odon substitute of the royal notary public Gaszner Bela, in virtue of sec. 67 of act 35 of the year 1874. Budapest the 24th October 1896. The president signed Bogisics. (L. S.)

No. 59697/1896. Seen for the legalization of the foregoing signature and the official seal of the president of the Budapest royal tribunal. Budapest the 26th October 1896. For the royal Hungarian minister of justice. Signed Dr. Alexy Albert ministerial consilor. (L. S.)

(Stamp.)

No. 278/1896. I the undersigned sworn interpreter do
129 hereby certify that the foregoing translation is in every respect conform- with the hereto-annexed original Hungarian text.

Budapest the 10th November, 1896.

[SEAL.] IVAN BOSANYI, LL. D.,
Sworn Interpreter.

The genuineness of the foregoing signature is hereby certified, Vienna November 16, 1896, by the royal and imperial ministry of foreign affairs.

[SEAL.] (Signed) PILOT.

U. S. CONSULATE GENERAL } ss:
at Vienna, Austria, }

I hereby certify that the foregoing signature of Pilot, chief of bureau and the seal of the I. R. ministry of foreign affairs of Austria Hungary are genuine and entitled to full faith and credit.

Given under my hand and official seal this 16th day of November, 1896.

MAX JUDD,
U. S. Consul General.

COMPLAINANT'S EXHIBIT No. 8—Certificate of Registration and Cancellation of Red and White Hu yadi Lajos Label.

Translated from Hungarian.

Copy. Trade-mark registry office of the Pozsony chamber of commerce and industry. Duplicate. Certificate (stamp 1 florin). The undersigned registry office hereby certifies that at the instance of Louis Schmidthauer of Komarom, chemist proprietor of the bitter-water spring at Nagy Igmand, the trade-mark annexed on next page was, on the twenty-fourth of May eighteen hundred eighty-six, at 11 a. m., in accordance with sec. 17 of the XX law of the year
130 1878 and on payment of 5 florins registration fee, entered sub No. 36 in the trade-mark register for the legal protection of the "Hunyady Lajos" Nagy Ignand bitter water brought into commerce by the said bitter-water-spring owner, with the remark that the trade-mark is to be used as label on the bottles. Pozsony, 26th April, 1893. Dr. Robert Bratkovics, registrar of trademarks. (L. S.) No. 1764/1893 (stamp 1 florin). The trade-mark registry office of the Gyor chamber of commerce and industry hereby certifies that this trade-mark was, for the sake of competence, transferred sub No. 17 into the trade-mark register of this chamber, pursuant to order No. 28133/892 of the minister of commerce. Gyor, 27th April 1893. The trade-mark registry office of the Gyor chamber of commerce and industry. Maurice Szendroi, second secretary, sworn deputy registrar of trade-marks (L. S.) No. 833/1897. Attestation. (Stamp 1 florin). The Györ chamber of commerce and industry certifies in all official faith that the trade-mark "Hunyady Lajos" annexed to above certification and originally registered with the Pozsony chamber of commerce and industry on May 24th 1886 sub No. 36, but for the sake of the competence transferred to the undersigned chamber and here registered sub No. 17 has been cancelled pursuant to order of the royal Hungarian minister of commerce, No. 2627 dated 19th March 1894 and such cancelling effected in the trade-mark registry book of this chamber. Györ, 24th March 1897. For the district chamber of commerce and industry. Anthony Terfy m. p. president, Szavay m. p. secretary (L. S.) No. 20968/97 (Stamp 1 florin) I hereby legalize the signatures of Anthony Terfy and Julius Szavay, president and secretary respectively of the Györ

chamber — commerce and industry. Budapest, 9th April 1897. Tichtl, ministerial councillor (L. S.)
(Stamp.)

No. 130/1897. I the undersigned sworn interpreter do
131 hereby certify that the foregoing translation is in every respect conform- with the hereto-annexed original Hungarian text.

Budapest, the 10th May, 1897.

IVAN BOSANYI, LL.D.,
[SEAL.] *Sworn Interpreter.*

N. S. No. 127/1897.

UNITED STATES CONSULATE, BUDAPEST, HUNGARY.

I, Frank Dyer Chester consul of the United States of America at Budapest do hereby certify that the forgoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal Hungarian court of commerce and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the
[SEAL.] eighteenth day of May 1897.

FRANK DYER CHESTER, *Consul.*

(Attached hereto is a specimen of the red and white Hunyady Lajos label.)

COMPLAINANT'S EXHIBIT No. 9—Certificate of Registration and Cancellation of Hunyadi Lajos Label No. 37.

Translated from Hungarian.

Copy. District chamber of commerce and industry at Györ. No. 3157/1896. Certificate. (Stamp 1 florin.) The undersigned chamber of commerce and industry hereby certifies that the trade-mark shown on next page duly inserted in the "Kozponti Ertesito"
(Central Advertiser) was entered in the trade-mark register
132 of this chamber on the sixteenth of July eighteen hundred ninety-four at nine o'clock in the morning sub No. 37, on behalf of Louis Schmidthauer, Kocs mineral bitter-water spring owner for the protection of bitter water. Györ 3rd October 1896. For the district chamber of commerce and industry. Anthony Terfy m. p. president. Szavay m. p. secretary. (L. S.) No. 932/1897. Attestation: (Stamp 1 florin.) The Györ chamber of commerce and industry certifies in all official faith that the trade-mark "Hunyady Lajos" annexed to above certificate and registered with the undersigned chamber on July 16th, 1894 sub No. 37 has been cancelled pursuant to order of the royal Hungarian minister of commerce No. 38043/VI dated 9th October 1896 and such cancelling effected in the trade-mark register book of this chamber, Györ, 24th March 1897. For the district chamber of commerce and industry. Anthony Terfy m. p. president, Szavay m. p. secretary. (L. S.) No.

2096897/VI (Stamp 1 florin). I hereby legalize the signatures of Anthony Terfy and Julius Szavay, president and secretary respectively of the Győr chamber of commerce and industry. Budapest, 9th April 1897. Tichtl, ministerial councillor (L. S.)

(Stamp:) No. 130/1897.

I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto annexed original Hungarian text.

Budapest, the 10th May, 1897.

IVAN BOSANYI, LL.D.,
Sworn Interpreter.

[SEAL.]

N. S. No. 124/1897.

UNITED STATES CONSULATE, BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest, do hereby certify that the foregoing is the true and
133 genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal Hungarian court of commerce, and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the
[SEAL.] eighteenth day of May, 1897.

FRANK DYER CHESTER, *Consul.*

Translated from Hungarian.

5147. Louis Schmidthauer, chemist at Komarom, caused to be registered with the Győr chamber of commerce and industry, on July 16th 1894 at 9 a. m. for his Kocs mineral bitter-water spring the trade-mark here shown sub No. 37 to be applied on bitter water, to be used as label on the bottles register No. 5147, group V, page 1196.

No. 37 (reduced size green ground, printing black and white of Hunyady Lajos label, annexed to this certificate).

(Stamp:) No. 130/1897.

I the undersigned sworn interpreter do hereby certify that the foregoing translation *is* in every respect conform with the hereto annexed original Hungarian text.

Budapest the 10th May 1897.

IVAN BOSANYI, LL.D.,
Sworn Interpreter.

[SEAL.]

N. S. No. 140/1897.

UNITED STATES CONSULATE, BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest, do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn inter-
134 preter of the royal Hungarian court of commerce, and as such is entitled to full faith and credit.

[SEAL.] Given under my hand and the seal of this office the 21st day of May, 1897.

FRANK DYER CHESTER, *Consul.*

COMPLAINANT'S EXHIBIT No. 10—Decree of Hungarian Minister of Commerce.

Royal Hungarian
minister of commerce.
No. 38043
1896.

Andor Saxlehner, Esq., as attorney of Mrs. Emily Pelikán, widow of Andreas Saxlehner, proprietor of the firm Andreas Saxlehner.

BUDAPEST,
VI. Andrássy-ut 3.

Upon the complaint raised by Andor Saxlehner of Budapest as representative of Mrs. Emily Pelikán, widow of Andreas Saxlehner proprietor of the Budapest firm "Andreas Saxlehner" against Louis Schmidthauer, of Komárom, chemist, with a view of cancelling certain trade-marks and having consulted in this matter the Györ chamber of commerce and industry and also the senate of trade-marks I hereby order the cancelling of the following trade-marks registered with the Györ chamber of commerce and industry, to wit:

1. The illustrated trade-mark called "Radetzky" registered on the 5th of December 1892 sub No. 19 for the defendant, and
135 2. The illustrated trade-mark called "Hunyadi Lajos" registered on the 16th of July 1894 sub No. 37.

The defendant is condemned to pay to the plaintiff according to § 6 of the XLI law of the year 1895 the sum of 35 florins, being the ready money expenses cause- by the action and the legal representation.

Motives.

The illustrated trade-mark registered for the defendant on the 5th of December 1892 sub No. 19, as more closely specified in the dispositive part of the present decision, had to be cancelled, for although it is evident that the proprietor of the trade-mark endeavoured to produce some difference on his trade-mark, yet the form of the trade-mark, its division into threefold fields, the colouring of the middle field, the diagonal printing in identical colours on the two outer fields are all apt to mislead the ordinary purchaser.

The objection of the defendant that with regard to the trade-mark in question there has already on one occasion a decision been brought to the effect that it is to be kept further valid, could not be taken into consideration, because in questions decided by administrative authorities there may still be room for revision, there being no regulation or law preventing new complaints from being fully examined and because the more strict principle of the XLI

law of the year 1895 is devolving the duty on the trade-mark authority not to eschew revision in the case of renewed complaints.

Finally the illustrated trade-mark registered for the defendant on the 16th of July 1894 sub No. 37 had also to be cancelled because this, by its form, its division into threefold fields, its colouring showing a very slight difference, and principally by the use of
136 the name of "Hunyady" that is an inscription prohibited according to article 4 of the § 3 of the II law of the year 1890 is to a large extent apt to mislead the consuming public, on the other hand the use of the name "Hunyady" is prejudicing the rights acquired by the plaintiff on the ground of § 10 of the law above quoted.

For all these reasons all of the trade-marks of defendant which were objected to had to be cancelled.

The costs were adjudged in favour of the plaintiff according to the amount of net expenses actually incurred.

Budapest, the 9th of October, 1896.

DÁNIEL.

Certificates of proper authentication are annexed to the original.

COMPLAINANT'S EXHIBIT No. 14—License Certificate.

Translated from Hungarian.

Copy from the original bearing a stamp for 1 florin No. 2356/Ki 92 certificate. By which it is officially certified on the part of the chief judge of the district Geszter, county Komárom, as trade authority of the first stage, that there does not appear from the trade registers of this district that Louis Schmidthauer, of Komárom, chemist has obtained from this authority a license for bringing into commerce the products of the Hunyady Lajos bitter-water spring which formerly existed within the boundary of the community Nagy-Igmánd, but which for the last two years have for security's sake been covered and out of working. No trace could be found of such license having been issued. N. Igmánd, 22nd August, 1892.

Louis Konkoly Thege, m. p., chief judge (L. S.), No. 863/1897.
137 (Stamp 50 kr.) I certify that this copy is exactly identical with the original, bearing a stamp for one florin, produced by the Budapest registered firm Andreas Saxlehner. Given at Budapest on the 31st, thirty-first day of March, eighteen hundred ninety-seven. Legalization 30 kr., stamp 50 kr.; total 80 kr. Albert Gászner (L. S.), No. 1813/, pres. 1897. The signature and official seal of Albert Gászner, Budapest, royal notary public, is hereby legalized according to S. 67 of the XXXV law of the year 1874. Budapest, 1st April, 1897. Dr. Francis Horváth, president (L. S.) No. 19867/min. of just., 1897. The signature and official seal of the president of the Budapest royal tribunal is hereby legalized. Budapest, 2nd April, 1897, from the royal Hungarian ministry of justice. Dr. Albert Alexy, ministerial councillor (L. S.)

(Stamp 50 kr.)

No. 130/1897.

I, the undersigned sworn interpreter do hereby certify that the foregoing translation is in every respect conform- with the hereto-annexed original Hungarian text.

Budapest the 10th May, 1897.

IVAN BOSÁNYI, LL. D.,
[L. S.] *Sworn Interpreter.*

N. S., No. 130/1897.

UNITED STATES CONSULATE, BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest, do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Iván Bosányi, sworn interpreter of the royal Hungarian court of commerce, and as such is entitled to full faith and credit.

Given under my hand and seal of this office, the eighteenth day of May, 1897.

[SEAL.] FRANK DYER CHESTER, *Consul.*

138 COMPLAINANT'S EXHIBIT No. 15—Certificate of Registration and Cancellation of Red and Blue Hunyadi Lajos Label.

Translated from Hungarian.

Copy. District chamber of commerce and industry at Győr. No. 1732/1893. Certificate. (Stamp 1 florin.) The trade-mark registry office of the Győr chamber of commerce and industry hereby certifies that the trade-mark annexed to this certificate and intended to be applied in this composition of colours on the bitter-water bottles to be brought into commerce in the United States of America and in Canada was, by the trade-mark registry office of this chamber, entered in the trade-mark register book of the chamber on July 9th eighteen hundred ninety-two at two o'clock afternoon sub No. 2 for Louis Schmidthauer, chemist at Komáron. Győr, 25th April, 1893. The trade-mark registry office of the Győr district chamber of commerce and industry. Julius Szávay, m. p. secretary, sworn register of trade-marks (L. S.) No. 933/1897. Attestation (Stamp 1 florin). The Győr chamber of commerce and industry certifies in all official faith that the trade-mark "Hunyady Lajos" annexed to the above certificate and registered with this chamber on the 9th of July 1892 sub No. 2 has been cancelled pursuant to order of the royal Hungarian minister of commerce No. 2627 dated 19th March 1894 and such cancelling effected in the trade-mark register book of this chamber. Győr 24th March 1897. For the district chamber of commerce and industry, Anthony Terfy m. p. president, Szávay m. p. secretary (L. S.) No. 20968–97 (stamp 1 fl.) I legalize hereby
139 the signatures of Anthony Terfy and Julius Szavay president and secretary respectively of the Győr chamber of commerce and industry, Budapest, 9th April 1897. Tichtl, ministerial councillor. (L. S.)

(Stamp 50 kr.) No. 130/1897. I, the undersigned sworn interpreter, do hereby certify that the foregoing translation is in every

respect conform- with the hereto-annexed original Hungarian text.
Budapest, the 10 May, 1897.

IVAN BOSÁNYI, LL. D.,
Sworn Interpreter.

[L. S.]

N. S. No. 123/1897.

UNITED STATES CONSULATE, BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Iván Bosányi, sworn interpreter of the royal Hungarian court of commerce and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the
[SEAL.] eighteenth day of May, 1897.

FRANK DYER CHESTER, *Consul.*

(Annexed to this is a red and purple Hunyady Lajos label.)

140 COMPLAINANT'S EXHIBIT No. 16—Certificate of New Springs of Schmidthaur.

Translated from Hungarian.

Copy. No. 3713/K. i. 1892 (stamp 1 fl.) Official certificate. By which in accordance with the protocol of inquiry drawn up under the above number, as well as with the personal experiences acquired on the spot, it is certified in all official faith by the chief judge of the district Gesztes, county Komarom, that Louis Schmidthauer, of Komarom, chemist, has, on his bitter-mineral-water establishment within the boundary of the community Kocs extending to about ¼ of a joch, four bitter-spring wells, in the immediate vicinity of each other, at present covered with timber structures bereft of any designations or inscriptions whatsoever. All the bitter waters brought into commerce under any denomination by the said proprietor are transported by him from the said walls, without the water from any of the said wells being marked by any separate name on being filled into the so-called balloons serving for the transport of the waters and having a capacity of about 56 litres each. In accordance with the protocol of inquiry referred to it is further certified that the filling of the single balloon is so effected that ⅓ of the bitter mineral water is taken from the one well, ⅓ from the other and ⅓ from the third. Nagy Igmand 9th December 1892. Louis Konkoly Thege m. p. chief judge (L. S.) No. 862/1897. I certify that this copy is exactly identical with the origical, bearing a stamp for one florin, produced by the Budapest registered firm Andreas Saxlehner.

Given at Budapest, 31st thirty-first March one thousand
141 eight hundred and ninety-seven. Legalisation 30 kr. stamp 50. Total 80 kr. Albert Gazner (L. S.) No. 1813/pres. 1897. The signature and official seal of Albert Gaszner Budapest royal notary public is hereby legalized according to sec. 67 of the XXXV

law of the year 1874. Budapest, 1st April 1897. Dr. Francis Horvath president (L. S.)

No. 19867/min. of just. 1897. The signature and official seal of the president of the Budapest royal tribunal is hereby legalised. Budapest 2nd April 1897. From the royal Hungarian ministry of justice. Dr. Albert Alexy ministerial councillor (L. S.)

(Stamp).

No. 130/1897. I the undersigned sworn interpreter do hereby certify that the foregoing translation is in every respect conform with the hereto-annexed original Hungarian text.

Budapest the 10th May 1897.

IVAN BOSANYI, LL. D.,
Sworn Interpreter.

[SEAL.]

142 N. S. No. 128/1897.

UNITED STATES CONSULATE, BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal Hungarian court of commerce and as such is entitled to full faith and credit.

[SEAL.] Given under my hand and the seal of this office the eighteenth day of May 1897.

FRANK DYER CHESTER, *Consul.*

COMPLAINANT'S EXHIBIT No. 17—Radetzky Certificate.

Translated from Hungarian.

Copy. Trade-mark registry office of the Pozsony chamber of commerce and industry. Duplicate. Certificate. (Stamp 1 florin.) The undersigned registry office hereby certifies that at the instance of Louis Schmidthauer, chemist and bitter-water-spring owner at Komáron, owner of the bitter-water springs at Kócs, the trade-mark annexed on next page was on the 15th fifteenth of February, eighteen hundred eighty-seven, at 4 o'clock p. m. in accordance with S. 17 of the XX law of the year 1878 and on payment of 5 florins registration fee, entered sub No. 46 in the trade-mark register with the remark that the trade-mark serves as label for the legal protection of the Kócs bitter water brought into commerce by the said
143 bitter-water spring owner under the name "Radetzky." Pozsony, 15th February 1887. The trade-mark registry office of the Pozsony chamber of commerce and industry. Dr. Bratkovics, registrar of trade-marks. (L. S.) No. 4135/1892 (stamp 1 florin). The trade-mark registry office of the Györ chamber of commerce and industry hereby certifies that this trade-mark was, for the sake of competence, transferred sub No. 19 into the trade-mark register of this chamber, pursuant to order No. 28133/892 of the minister of commerce. Györ, 7th December 1892. The trade-mark registry

office of the Györ chamber of commerce and industry. Julius Szávay m. p. secretary of the chamber, sworn registrar of trade-marks (L. S.). No. 932/1897. Attestation stamp 1 florin. The Györ chamber of commerce and industry certifies in all official faith that the trade-mark "Radetsky" annexed to above certificates and originally registered with the Pozsony chamber of commerce and industry on February 15th, 1886, sub No. 46, but for the sake of competence transferred to the undersigned chamber and here registered sub No. 19 has been cancelled pursuant to order of the royal Hungarian minister of commerce. No. 38043/VI dated 9th October, 1896, and such cancelling effected in the trade-mark register book of this chamber. Györ, 24th March 1897. For the district chamber of commerce and industry. Anthony Terfy m. p. president, Szávay m. p. secretary (L. S) No. 20968/97 (stamp 1 florin). I hereby legalize the signatures of Anthony Terfy and Julius Szávay, president and secretary respectively of the Györ chamber of commerce and industry. Budapest 9th April, 1897. Tichtl, ministerial councillor (L. S.)

144 (Stamp 50 kr.) No. 130/1896. I, the undersigned sworn interpreter do hereby certify that the foregoing translation in -very respect conform- with the hereto annexed original Hungarian text.

Budapest the 10th May 1897.

[L. S.] IVAN BOSANYI, LL.D.,
Sworn Interpreter.

N. S. No. 122/1897.

UNITED STATES CONSULATE, BUDAPEST, HUNGARY.

I, Frank Dyer Chester, consul of the United States of America at Budapest do hereby certify that the foregoing is the true and genuine signature and seal of Dr. Ivan Bosanyi, sworn interpreter of the royal Hungarian court of commerce and as such is entitled to full faith and credit.

Given under my hand and the seal of this office the eighteenth day of May, 1897.

[SEAL.] FRANK DYER CHESTER, *Consul.*

(Annexed to this is a red and white "Radetzky" label.)

146 UNITED STATES PATENT OFFICE.

ANDREAS SAXLEHNER, of Buda-Pesth, Austria-Hungary.

Trade-mark for Natural Aperient Water.

Statement and declaration of trade-mark No. 14252, registered April 5, 1887. Application filed November 12, 1886.

Statement.

To all whom it may concern:

Be it known that I, Andreas Saxlehner, a subject of the Emperor of Austria-Hungary, residing at Buda-Pesth, in Hungary, and doing business at said Buda-Pesth, have adopted for my use a trade-mark for natural aperient water, of which the following is a full, clear, and exact specification.

The trade-mark that is the subject of the application in connection with which this specification or statement is made consists of the word-symbol "Hunyadi" It has generally been applied in the form and manner shown in the accompanying fac-simile.

(Here follows diagram marked p. 145.)

The trade-mark—to wit, the word-symbol "Hunyadi"—has been displayed at the top or upper field of the label, followed by the word "János," so as to form together with this word the uppermost line of the label. Below this uppermost line are placed the words "Budai Keserüviz Forrás," below which has been placed a medallion showing the head of a knight with helmet removed, with scroll-work upon either side of the medallion. Immediately under the medallion the word-symbol "Hunyadi," accompanied by the word "János," has been repeated. The ground or field of the label has been red, the letters and medallion and ornamentation being in blue and black, or white and black, the whole disposed and arranged as shown in the accompanying fac-simile aforesaid. The color both of the ground and of the inscription may, however, be varied at will, and the disposition of the parts modified.

The trade-mark consists, essentially, of the said word-symbol "Hunyadi," without regard to any one or more of the parts and features aforesaid in connection with which it has been used.

It is not to be understood from the foregoing that I in anywise curtail, relinquish, waive, or abridge my right to the exclusive use of the said medallion, the label as a whole, or to any one or more of the parts or features aforesaid, the distinctions hereinbefore recited being made only to the end that the particular trade-mark sought to be protected hereby may be clearly understood.

The said trade-mark I have used continuously in my business since March 15, 1863.

The class of merchandise to which this trade-mark is appropri-

4845

TRADE-MARK.

A. SAXLEHNER.

NATURAL APERIENT WATER.

No. 14,252. Registered Apr. 5, 1887.

No. 716.
Saxlehner
v.
Nielsen
p. 145

Witnesses
F. E. Boulter
Wm. R. Davis

Proprietor,
Andreas Saxlehner
per Henry Wells
His attorney

ated is mineral water, and the particular description of goods comprised in said class upon which I use it is natural aperient water. It has been printed in the form and manner hereinbefore set forth upon paper labels, which have been attached to the bottles in which the water has been put upon the market. I intend to use it in every lawful manner at will, as may appear to be expedient.

ANDREAS SAXLEHNER.

Witnesses:
PAT ROVIES SURY.
WILLIAM MÁRIÁSSY.

Declaration.

BUDA-PESTH, GERMANY, *ss:*

Andreas Saxlehner, being duly affirmed, deposes and says that he is the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that he has at this time a right to the use of the trade-mark therein described; that no other person, firm, or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that it is used by him in commerce between the United States and foreign nations or Indian tribes, and particularly with Austria-Hungary, Germany, and Great Britain, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

ANDREAS SAXLEHNER.

Affirmed and subscribed before me this 21st day of February, 1887.

[L. S.] HENRY STERN,
U. S. Consul at Buda-Pesth, Hungary.

147 Circuit Court of the United States, Eastern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
ALEXANDER NIELSEN, Defendant. } In Equity.

The Answer of Alexander Nielsen, Respondent, to the Bill of Complaint Exhibited against Him by the Above-named Complainant.

The respondent, now and at all times hereafter saving and reserving to himself all and all manner of benefit of exception which may be had or taken to the manifold errors, uncertainties, imperfections and insufficiencies of the said bill of complaint, for answer thereto, or to so much as he is advised it is material or necessary to make answer to, answering says:

1. That he has no knowledge, information or belief as to whether the complainant is the widow of Andreas Saxlehner, nor whether the said Andreas Saxlehner was until the 24th day of May, 1889,

or at any time, the proprietor of a certain well situated at Oreod, within the city limits of the city of Buda Pest, or whether the said Andreas Saxlehner, on or about the year 1863, commenced
148 to bottle the waters of said well and to sell the same in the market, and therefore denies the same and leaves the complainant to make such proof thereof as she may be advised.

2. He denies that the said Andreas Saxlehner, for the purpose of distinguishing his said bitter waters from other bitter waters then known and sold in the market, adopted the arbitrary and fanciful name and trade-mark of "Hunyadi Janos."

3. He has no knowledge, information or belief whether by reason of the great care exercised by the said Andreas Saxlehner in the business of obtaining, caring for and bottling said waters and selling the same, said business increased and additional territory was acquired and new wells opened, and that thereupon said Saxlehner applied said name of "Hunyadi Janos" to the bottled water of all said springs sold by him in the market, and therefore he denies the same and leaves the complainant to make such proof thereof as she may be advised.

4. He denies that the mineral waters bottled and sold by the said Saxlehner in Hungary and other European countries and in all the markets of the world have been known and called by the name of "Hunyadi Janos water."

5. The respondent, further answering, says that the name "Hunyadi" is descriptive of the nature or quality of the water of the said well or wells, and denies that the said name was adopted as a fancy or ideal name or as a trade-mark to distinguish the water of the said Saxlehner wells from all other waters. He denies that soon after said business of bottling and exporting the said water from the wells owned by the said Saxlehner the said water became popular, and soon after the year 1863 was exported to the United States of America.

149 6. This respondent alleges that before the said water from the wells owned by the said Saxlehner was introduced into the United States and became popular therein the name "Hunyadi" became the common appellation of bitter waters taken from the Hungarian wells.

7. He has no knowledge, information or belief as to whether in the month of March, 1876, the said Andreas Saxlehner entered into a contract with the Apollinaris Co., Limited, by which he granted the said company the exclusive right to sell the said natural bitter water in the United States and elsewhere, and that said contract was extended and terminated on the 25th of March, 1896, and leaves the complainant to make such proof thereof as she may be advised.

8. He denies that the label used by the Apollinaris Co., Limited, upon the bottles containing the bitter water from the wells of the said Andreas Saxlehner was substantially like the label originally used prior to the year 1876 by the said Andreas Saxlehner upon the bitter water from his said wells; and alleges that complainant and her predecessor have used a variety of different labels upon the

bitter water sold by them, so that there has been neither continuity nor invariability of use.

9. He has no knowledge, information or belief as to whether since the year 1876 large quantities of the bitter water labeled with the label of the Apollinaris Co., Limited, were exported to the United States of America.

10. He admits that the water thus bottled became known as the water bottled by Andreas Saxlehner; but he denies that the public understood by the name "Hunyadi water" the water bottled by Andreas Saxlehner and sold for him by the Apollinaris Co., Limited.

150 11. He has no knowledge, information or belief as to whether the complainant is the successor in business of the said Andreas Saxlehner, nor whether the said Andreas Saxlehner died on May 24, 1889, nor whether the complainant succeeded him in the said business of bottling and exporting said bitter waters and is now the proprietor of said business, and therefore denies the same and leaves the complainant to make such proof thereof as she may be advised.

12. He has no knowledge, information or belief whether the complainant is the sole proprietor of the firm of Andreas Saxlehner, nor whether she is lawfully doing business in Austria-Hungary under said firm name, and therefore denies the same and leaves the complainant to make such proof thereof as she may be advised.

13. He denies that dealers in mineral waters and the purchasers and consumers of said water generally have come to know and have long known the bitter water alleged to be bottled by the complainant under the name of "Hunyadi," except in so far as the word "Hunyadi" is a generic term, with equal justice applicable to the bitter water obtained from other wells in Hungary.

14. He has no knowledge, information or belief as to whether the water furnished and sold by complainant as "Hunyadi Janos" in the United States is procured directly from the well or wells alleged to have been the property of Andreas Saxlehner, deceased, and leaves the complainant to make such proof thereof as she may be advised.

15. He admits that the water sold by complainant has come generally to be known and designated by the trade so called and

151 by purchasers and consumers of the water in the United States as "Hunyadi," but that the word "Hunyadi" is a generic term applying equally to the bitter water obtained from other wells in Hungary and dealt in by numerous other persons.

16. He denies that contriving to injure the complainant and to deprive her of the benefits and advantages which might and otherwise would accrue unto her, and to injure and impose upon the public, and in violation of the complainant's rights and infringement of her alleged trade-mark and label, he sold or caused to be sold bitter water in bottles and with capsules and labels closely resembling those used by complainant, and which bottles, capsules

and labels, in color, design and general appearance, are a close imitation of complainant's, or that he threatens so to do.

17. He denies that he is fraudulently and wrongfully endeavoring to sell his waters not coming from complainant's wells as Hunyadi water from the wells originally owned by the said Andreas Saxlehner.

18. He denies that the similarity between the bottle, capsule, label and name used by complainant and defendant is so great that the public and consumers and purchasers are likely to be deceived thereby and to suppose the water so sold by the defendant to be that sold by complainant.

19. He denies that the value of the matter in dispute between the complainant and the defendant, exclusive of interest and costs, exceeds the sum of two thousand dollars, and that great and irreparable loss and injury has been, is and will be caused to complainant by the alleged acts of this defendant.

20. And this respondent further alleges that the word
152 "Hunyadi," as well as the general style of bottle, capsule and label used by the defendant in connection with the sale of the bitter water dealt in by him, has for a great many years past, with the knowledge and consent of the complainant and her alleged predecessor in business, been in use in the United States and elsewhere by a great many persons and dealers and the public generally, so that the word "Hunyadi," by long use and by the acquiescence of the complainant and her predecessor, has become the generic term of bitter water, and that the style of bottle, capsule and label has likewise, with her acquiescence and consent and that of her alleged predecessor, been used in the United States and elsewhere by a great many different persons and dealers and the public generally, so that the said style of bottle, capsule and label have long since lost their alleged individuality and their indication of ownership.

21. And this respondent, further answering, alleges that by the acquiescence and consent for so many years past the word "Hunyadi," as well as the style of bottle, capsule and label, alleged to indicate the bitter water bottled by complainant and her alleged predecessor has been abandoned to the public, and that in view of the proprietary rights acquired by this defendant and others, by virtue of such acquiescence, abandonment and the laches of the complainant and her predecessor, it would be inequitable to disturb the defendant from continuing to do the acts complained of.

22. And the respondent denies all and all manner of unlawful combination by the said bill charged, without this, that there is any other matter, cause or thing in the said bill of complaint contained (material or necessary to make answer unto and not
153 herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied), true to the knowledge or belief of the respondent, all of which matters and things the respondent is ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly prays to be hence dis-

missed, with his reasonable costs and charges in this behalf most wrongfully sustained.

ALEXANDER NIELSEN.

EDWARD KAUFMANN,
Respondent's Sol'r, 280 Broadway, New York.
LOUIS C. RAEGENER, *Of Counsel.*

(Endorsed:) "Filed May 3, 1897."

154 Circuit Court of the United States, Eastern District of New York.

EMILIE SAXLEHNER
vs.
ALEXANDER NIELSEN. } In Equity.

Testimony taken on behalf of the defendant this 23d day of November, 1897, before Richard P. Morle, special examiner, pursuant to notice, at the office of Messrs. Goepel & Raegener, 280 Broadway, New York city.

Appearances.

Mr. Antonio Knauth, of counsel for complainant.
Mr. Louis C. Raegener, of counsel for defendant.

CHARLES O. WEISZ, a witness on behalf of the defendant, having first been duly sworn, testifies:

By Mr. RAEGENER:

1 Q. What is your name, age, residence and occupation?

A. Charles O. Weisz; 36 years old; born in New York city; I reside at 668 East 144th street; I am buyer for McKesson & Robbins, No. 91 Fulton street, city of New York.

2 Q. How long have McKesson & Robbins been in business, and what is their business?

155 A. I don't know exactly, but about 50 years I guess, or more; their business is that of wholesale druggists.

3 Q. How long have you been connected with said firm?

A. 20 or more years.

4 Q. Will you please name some of the Hungarian aperient waters imported into this country during the last ten years?

A. Hunyadi Arpad, Hunyadi Matyas, Hunyadi Lajos, Hunyadi Laszlo, and there is one other.

5 Q. Have you produced some of the catalogues of McKesson & Robbins, and others?

A. I have none of McKesson & Robbins, but I have some of C. N. Crittendon's, one which I have had in my possession since 1891, and another one from Crittendon which I have had in my possession since 1895, and I have also a price book of McKesson & Robbins which I have had since 1891.

6 Q. Who is Charles N. Crittendon?

A. Proprietary medicine-house.

7 Q. Dealer in mineral waters among other things?
A. Yes, sir.
8 Q. Where is their place of business?
A. 115 Fulton street.
9 Q. It is an old house?
A. Yes, sir.
10 Q. Established for many years?
A. Yes, sir.
11 Q. What do you find in this 1891 catalogue in connection with Hunyadi waters?
A. Got Hunyadi Arpad, Hunyadi Janos, and Hunyadi Matyas.
12 Q. What do you find in the Crittendon catalogue 1895-'96 in that connection?
A. Hunyadi Bela, Hunyadi Janos, Hunyadi Matyas and Hunyadi Lalas.
13 Q. What do you find in the McKesson & Robbins price book kept by you?
A. Hunyadi Laszlo, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Janos.
156 14 Q. Since you have been familiar with these different Hunyadi waters in the market, what have you and others in the trade understood the word "Hunyadi" to mean?

Objected to as incompetent.

A. Aperient water, cathartic water.
15 Q. Have you ever had calls at McKesson & Robbins' for "Hunyadi water" alone, and if so, what have you asked the customer?

Objected to as leading.

A. Do you mean in case they didn't specify?
16 Q. Yes?
A. I asked them what kind they wanted.
17 Q. Did you have calls for "Hunyadi"?
A. Occasionally; as a general rule though they specified.
18 Q. As a general rule the customers specified?
A. Yes, sir.
19 Q. About how many employees have McKesson & Robbins at their place of business in Fulton street?
A. 450.

Cross-examined by Mr. KNAUTH:

20 X Q. How long have you been with the firm of McKesson & Robbins?
A. Twenty or more years.
21 X Q. In what capacity?
A. From errand boy up.
22 X Q. How long have you been an errand boy there?
A. Oh, I don't recollect that, that is too far back for me.
23 X Q. That is just what I want to know?
A. How long was I errand boy?
24 X Q. Yes?

A. I am unable to say that.
25 X Q. What did you become after errand boy?
A. Delivery clerk.
157 26 X Q. In what department?
A. In the jobbing department—petty cash department.
27 X Q. For how many years?
A. I don't know how long I was there.
28 X Q. What were you after that time?
A. Assistant buyer.
29 X Q. How long have you been assistant buyer?
A. Assistant buyer I should judge about six or seven years.
30 X Q. Isn't it a fact that your knowledge of mineral waters extends only back to about six or seven years since you have been a buyer with this firm?
A. No.
31 X Q. How long before that time have you been acquainted with the sale of mineral waters?
A. I have been acquainted with the sale of mineral waters for at least ten or twelve years.
32 X Q. Is it ten or twelve?
A. I can't say positively.
33 X Q. Can you give me the year since when you knew anything about the sale of mineral waters?
A. No, I cannot.
34 X Q. Were you acquainted with the sale of mineral water in 1886?
A. Yes.
35 X Q. All through that year?
A. Yes, sir.
36 X Q. Did you know of any water named "Hunyadi Janos water" in that year?
A. I believe I did.
37 X Q. Did you have anything to do with its sale?
A. Used to order it occasionally.
38 X Q. Of whom?
A. I think—in 1886 I don't know whether De Bary had it in 1886, or whether it was the Apollinaris Company—I wouldn't say positively.
39 X Q. But you can distinctly remember the Hunyadi Janos in the year 1886?
A. Yes.
40 X Q. Did you ever order it yourself?
A. I guess I did.
158 41 X Q. How did you order it?
A. On one of our order blanks.
42 X Q. How did you describe it?
A. So many cases of Hunyani Janos.
43 X Q. In every instance use the words Hunyadi Janos?
A. I may have said "Hunyadi water."
44 X Q. Is it not a fact that the Hunyadi Janos water was ordered frequently as "Hunyadi water"?

A. That I wouldn't say.

45 X Q. You don't know whether it was or not?

A. How can I say, if a man ordered "Hunyadi water," whether it was Hunyadi Janos or not.

46 X Q. Do you know how the Hunyadi Janos was ordered in and through the year 1887?

A. No, I can't answer that.

47 X Q. Can you answer it for the year 1888?

A. Not positively.

48 X Q. Can you answer it for the year 1889?

A. By referring I can.

49 X Q. No, I mean now.

A. No.

50 X Q. What do you mean by "referring"?

A. Referring to the books.

51 X Q. What books?

A. Our books—McKesson & Robbins.

52 X Q. Do you mean the books before you?

A. No, my own books.

53 X Q. Can you say how the Hunyadi Janos water was ordered during the year 1890?

A. Ordered by us do you mean?

54 X Q. Yes.

A. We ordered "Hunyadi Janos water."

55 X Q. Will you state that it was not ordered as "Hunyadi water"?

A. Well, I won't say positively that I always put "Janos" on the order, but in most cases I did.

56 X Q. Then you are not prepared to say that in some cases it was not ordered as "Hunyadi water"?

159 A. In some cases I may possibly say "Hunyadi water." I wrote an order today and said "Janos."

57 X Q. I am asking you whether it is not a fact that up to the present day your house sometimes orders Hunyadi Janos water as "Hunyadi water" or "Hunyadi."

A. Not intentionally.

58 X Q. You are sure of that?

A. Yes, sir.

59 X Q. So if I showed you order slips from your own house, which contained only the word "Hunyadi," and were addressed to the firm of Saxlehner, you would consider them not true?

A. I do not say that.

60 X Q. You mean, then, that it may have happened?

A. Yes, sir.

61 X Q. Are you the only man who orders Hunyadi water in your firm?

A. Yes, sir.

62 X Q. Since when have you been the only man?

A. Oh, I may have been away and Mr. McKesson may have ordered it.

63 X Q. Since when have you been in charge of ordering mineral waters?
A. Exclusively?
64 X Q. Yes.
A. About five years last.
65 X Q. Before that who was in charge of ordering mineral waters?
A. Mr. Hazard.
66 X Q. Where is he now?
A. Around town somewhere.
67 X Q. He is still in the employ of McKesson & Robbins?
A. No.
68 X Q. What are his initials?
A. James.
69 X Q. Do you know in whose employ he is?
A. No.
70 X Q. You know how to find him?
A. I see him occasionally, he comes in the store; I know he lives in Harlem somewhere.
71 X Q. Where were you born?
A. New York city; born in Pearl street here.
72 X Q. Always lived in New York?
A. Yes, sir.
73 X Q. Never been abroad?
A. No, sir.
160 74 X Q. When you first knew of the Hunyadi Janos bitter water, did you know of any other bitter water which employed the name "Hunyadi" on its label in some form or connection?
A. Yes, sir, I knew a red label.
75 X Q. What was that?
A. Hunyadi water, I don't remember whether "Janos" was on that or not. That was in De Bary's time.
76 X Q. What do you mean by that?
A. When De Bary was agent. A red-label and a blue-label Hunyadi water.
77 X Q. Simply called "Hunyadi water"?
A. To the best of my recollection. I can't tell positively whether there was any other name on it or not. I believe the labels were identical except that one was red and the other blue.
78 X Q. Please look at the present label of the Hunyadi Janos water. Do you call it a red or a blue label?
A. I call it a blue label. The printing was in red on the side.
79 X Q. You mean where the blue paper appears in the present label, it was then red?
A. Yes, sir.
80 X Q. How was the middle field?
A. I don't recollect that.
81 X Q. You don't know what water that was?
A. Hunyadi water.
82 X Q. What water did you understand it to be?
A. Red label.

83 X Q. Where did it come from?
A. I don't know. It was an imported water, that is all I know.
84 X Q. By what name did it go in the store?
A. "Red-label Hunyadi."
85 X Q. Wasn't the Hunyadi Janos also a "red-label Hunyadi"?
A. No, sir, it was blue and red. There were two, blue and red, and we designated them as "blue label" and "red label."
161 86 X Q. The Hunyadi Janos water you called "blue label"?
A. I didn't say so.
87 X Q. Do you know how it was entered in the books of the firm?
A. Yes, sir; I have got it right here to show to you, "red label" and "blue label."
88 X Q. From what year does this entry to which you point now date?
A. This book was made out in 1885.
89 X Q. From what time does this entry date, "Hunyadi red"?
A. 1885.
90 X Q. All of 1885?
A. There were no purchases made after 1885 of "red label," it was previous to that we used to handle the "red label."
91 X Q. It was previous to 1885 you handled the "red label"?
A. Yes, sir.
92 X Q. How was that called?
A. "Hunyadi red label."
93 X Q. And the other was called "Hunyadi blue label"?
A. Yes, sir.
94 X Q. The Hunyadi blue label you say was substantially like the present blue label of the Hunyadi Janos water?
A. Yes, sir; as I recollect it.
95 X Q. Now isn't it a fact that the "Hunyadi red label" which you have mentioned was this water (indicating)?
A. I couldn't identify it.
96 X Q. But you won't say that it was not?
A. I can't say they were not.
97 X Q. It may have been that what you have spoken of as "red label" was the Hunyadi Janos water in the so-called European label, which was red and white, and of which there is a sample before you?
A. I couldn't say, I only know it was "red label" and "blue label."
98 X Q. Please go through the portions of this book and see if there are any other entries of red and blue labels?
162 A. That is the place for Hunyadi water, and that is the only place you will find any entry of Hunyadi water.
99 X Q. So, as I understand it, this is the first record which you have of your firm of the sale of any Hunyadi water?
A. No, I didn't say it was.
100 X Q. The first one that you have been able to find?
A. No.

101 X Q. Have you been searching for records of Hunyadi entries?

A. No.

102 X Q. You brought this simply by accident?

A. I brought the books because I was asked to.

103 X Q. Who asked you to?

A. The subpœna says to bring books.

104 X Q. What books were you asked to bring?

A. Anything pertaining to Hunyadi water.

105 X Q. Did you bring all the books that you could find as to entries of Hunyadi water?

A. No, I wasn't going to bring all the books, if you want them all you will have to send a cab.

106 X Q. You just took up at random this book here?

A. I didn't take anything at random, I brought what I thought was necessary.

107 X Q. That was the only thing you considered to be necessary in answer to the subpœna?

A. Yes, sir.

108 X Q. Can you tell us what is the meaning of the next entry following the words "Hunyadi red" and "Hunyadi blue" of Hungarian bitter waters?

A. There was such a water at the time.

109 X Q. What water was that?

A. I have forgotten what they call it, there was another name to it.

110 X Q. Was it another water different from Hunyadi?

A. It was not called Hunyadi.

111 X Q. Why was it called Hungarian water?

A. I am unable to state that. I only know what the label read "Hungarian bitter water."

112 X Q. You found that on the label?

A. Yes, sir.

163 113 X Q. And thereupon you put down in your book the "Hungarian bitter water"?

A. I took it from my previous books. For instance, this book is copied from that one.

114 X Q. You have already stated that to you the name "Hunyadi water" means an aperient water. If that is true why did you not call this Hungarian bitter water "Hunyadi"?

A. Because it wasn't Hunyadi.

115 X Q. Why wasn't it Hunyadi?

A. It wasn't called so; we called them by their proper names; they may be all alike.

116 X Q. You called them by the name on the label?

A. Yes, sir.

117 X Q. And if a water bears the name "Hunyadi" on the label you call it Hunyadi?

A. Yes, sir.

118 X Q. And if it bears the name of "Apenta" on the label you call it Apenta?

A. Yes, sir.

119 X Q. And if it bears the name "Hungarian bitter water" on the label you call it Hungarian bitter water?

A. Yes, sir.

120 X Q. There is nothing in the mere name "Hunyadi" to suggest to you any Hungarian bitter water?

A. Know it as aperient water.

121 X Q. You have known several waters which have called themselves or styled themselves "Hunyadi"?

A. I know several Hunyadi waters.

122 X Q. If today I should bring you a bottle of Hungarian bitter water, which did not bear the name Hunyadi water on the label, would you call it "Hunyadi"?

A. I should call it whatever was on the label.

123 X Q. You would not call it "Hunyadi" if the name Hunyadi was not on the label?

A. Why no, certainly not.

124 X Q. I show you here a bottle of what I understand to be a Hungarian bitter water, and ask you whether you call that
164 a Hunyadi water?

A. I call that "Lajos" water.

125 X Q. Have you sold any of this water?

A. We have got some of it now.

126 X Q. How do you enter it now on your books?

A. It used to be called "Hunyadi Lajos." I intend to change it on my books.

127 X Q. When you order it, how do you order it?

A. I think the last time I ordered, I ordered Hunyadi Lajos water.

128 X Q. When you ordered the Hunyadi Lajos water, didn't you get a bottle of this kind which bears the name "Hunyadi Lajos"?

A. I couldn't tell you. I didn't see it. I don't handle the goods.

129 X Q. The bottle which I now show you bears the name "Hunyadi Lajos"?

A. Yes, sir.

130 X Q. In such a case, how would you order it?

A. I would order "Hunyadi Lajos water."

131 X Q. If you wanted the other water of which I showed you a specimen before, which had the name "Lajos" "Forras," how would you order?

A. I would order "Lajos" water.

132 X Q. Have you ever known of Mattoni and Wille's bitter water?

A. I don't recollect that.

133 X Q. Have you ever known of the Royal Hungarian King's bitter water?

A. It seems to me I did have a Royal water at one time or another. I am not very positive, but it seems to me I have heard of that. I haven't got any account of it.

134 X Q. Do you purchase any Royal Hungarian bitter water from Eisner & Mendelson?

A. No.

135 X Q. You can't state at the present time what this bitter water was which you found entered in the year 1885 on your book under the name of "Hungarian bitter water"?

A. I can get a bottle of it down at the store. Our firm still keeps it.

165 136 X Q. They have always kept it for sale?

A. Yes, sir.

137 X Q. That is not called Hunyadi?

A. No, sir.

138 X Q. You didn't call it a Hunyadi water?

A. No.

139 X Q. Have you on sale any bitter water which is called "Hungaria"?

A. No, sir.

140 X Q. Have you ever seen that water?

A. Not to my knowledge.

141 X Q. Have you ever sold or handled a Hungarian bitter water of the name "Deak Ferencz"?

A. No.

142 X Q. Have you ever handled or sold a Hungarian water called "Franz Josef"?

A. Yes, sir; we have got that now, we handle that now.

143 X Q. Can you state how long your firm has sold that water?

A. Since 1893.

144 X Q. You still have that on sale?

A. Yes, sir.

145 X Q. And sell it?

A. Yes, sir.

146 X Q. Do you know the bottles or labels?

A. I have seen them, but I couldn't identify it. I don't handle the waters, I only purchase them and see them occasionally, of course.

147 X Q. Do you call that a Hunyadi water?

A. I call it the "Franz Josef" water, and I enter it in my book as such.

148 X Q. When you talk of that water what do you call it?

A. "Franz Josef" water.

149 X Q. You don't call that a Hunyadi water?

A. No.

150 X Q. You wouldn't consider it a proper style or description of that water to call it a Hunyadi water?

A. No.

151 X Q. Do you know where it comes from; does it come from Hungary?

A. It comes from that way, I know that it is all imported.

166 152 X Q. Do you know of any other Hungarian waters which bear other names than Hunyadi?

A. No, I don't remember any other Hungarian waters.

153 X Q. Have you known this red and white label of the Hunyadi Janos water as it is sold in Europe?

A. No.

154 X Q. You are not acquainted with that?

A. No.

155 X Q. But you have been acquainted for years, have you not, with the red and blue Hunyadi Janos label?

A. Yes, sir.

156 X Q. Now, when you knew that water first, it was about 1886?

A. Oh, I couldn't state that, I knew it in De Bary's time. It was a blue label, I don't know whether the label was identical to that, I knew a Hunyadi red and Hunyadi blue label, but I couldn't say that the label was precisely like that.

157 X Q. Can you state whether at the time when you first knew this blue label and red label of Saxlehner's water there were any other waters in the market which had similar blue and red labels like this?

A. At that same time?

158 X Q. Whenever you knew this first?

A. I couldn't state that positively; no, not without referring.

159 X Q. Are you acquainted with the way in which this water has been advertised in this country? I mean the Hunyadi Janos water.

A. I have seen it around in circulars and cards.

160 X Q. It has been largely advertised?

A. Largely advertised, yes, sir, in newspapers.

161 X Q. Isn't it the most largely advertised of the bitter waters?

A. I couldn't say that; I don't know how much money they have spent.

162 X Q. Do you know of any other bitter water which has been more widely advertised than Hunyadi Janos?

A. No, sir; I couldn't say that.

167 163 X Q. Have you ever seen any advertisements of the Hunyadi Lajos water?

A. I don't recollect whether I did or not, don't recollect ever seeing any.

164 X Q. Was that water sold at a less price than the Hunyadi Janos water?

A. Yes, sir.

165 X Q. You purchased it from the agents for less than the Hunyadi Janos?

A. Yes, sir.

166 X Q. When you sell that Hunyadi Lajos water again, or rather sold it, did you charge the same price for it as for the Hunyadi Janos?

A. Sold it at a less figure.

167 X Q. So that it is a cheaper water in price?

A. Cheaper in price.

168 X Q. Do you recognize any similarity between the label of the Hunyadi Janos and the label of the Hunyadi Lajos such as it appears in the blue and red label?

A. Well, you might say they were similar, and you might say they were not.

169 X Q. What is your impression about it if these bottles are placed in a drug store?

A. If the bottles were placed in a drug store and anybody comes in for a bottle of Hunyadi water, I presume the druggist would sell whichever he would make the most money on.

170 X Q. Which one of the two would it be?

A. It would all depend on what he gets for it.

171 X Q. Do you know what he gets for it?

A. That I do not.

172 X Q. Do you think that anybody could be deceived by the similarity of the red and blue Hunyadi Janos label, and this label "Lajos Forras," and take one for the other?

A. I shouldn't say so, I know I wouldn't; if I wanted "Janos" I certainly wouldn't take that one (indicating) without even reading the label.

168 173 X Q. You can distinguish the different colors and names?

A. Different in every way, I should say.

174 X Q. Do you think anybody could be deceived by the similarity between the red and blue Hunyadi Lajos label and the Hunyadi Janos label?

A. Not if he knew what he wanted.

175 X Q. And if he didn't?

A. Oh, you couldn't be accountable for people who didn't.

176 X Q. Your firm sells mostly to other dealers does it not, or do you sell directly to the public?

A. We sell to the trade.

177 X Q. Altogether?

A. Well, a man might come in there and buy a bottle, of course.

178 X Q. Your firm is a wholesale house?

A. Yes, sir.

179 X Q. And whatever orders your firm gets for mineral waters either come from druggists or retail dealers?

A. As a general rule, yes.

180 X Q. And those druggists and retail dealers usually know what they want when they order Hunyadi water?

A. Yes.

181 X Q. Do you know whose portrait that is on the red and blue Hunyadi Lajos label?

A. No.

182 X Q. Have you never inquired?

A. No, sir, never even looked at it close enough to see or try to see.

183 X Q. Who did you suppose this Hunyadi Lajos to be?

A. Never gave it a thought.

184 X Q. Do you know where that water comes from?

A. I think it comes from Buda-Pesth.

185 X Q. Do you know anything about the quality of the water; have you tried it?

A. I have taken Hunyadi water, yes.

186 X Q. Have you ever taken Hunyadi Lajos water?
A. Yes.
187 X Q. You have tried it on your own person?
A. Yes.
188 X Q. Are you a chemist?
A. No, sir.
169 189 X Q. You don't know anything about the analysis of mineral waters, do you?
A. No.
190 X Q. Now, will you state at what price your firm has bought this Hunyadi Lajos water from the defendant Alexander Nielsen?
A. When, at any time?
191 X Q. At any time?
A. We used to pay him $5.50 for it, I think the last we paid him was $6.00 or $6.50—$5.25, $5.50, $5.75.
192 X Q. That is for a case of fifty bottles of Hunyadi Lajos?
A. Yes, sir, $5.50 was the price generally.
193 X Q. Has that been the uniform price for that water?
A. Yes, sir, until lately; that is for that quantity.
194 X Q. And lately has the price changed?
A. Yes, sir, made a difference of a dollar more on a case.
195 X Q. On account of the duty?
A. Yes, sir.
196 X Q. At what price do you sell a case of Hunyadi Lajos water?
A. We get $7.00 to $7.50.
197 X Q. That is from the retailer?
A. Yes, sir.
198 X Q. Do you know how physicians usually prescribe the Hunyadi Janos water?
A. I never saw a prescription for it.
199 X Q. You don't know therefore?
A. No.
200 X Q. Do you know whether or not your firm received a notice from the complainant, Mrs. Saxlehner, in the fall of last year, 1896, cautioning your firm to stop the sale of any mineral waters bearing the name "Hunyadi" except Hunyadi Janos?
A. I think there was such a circular.
201 X Q. What has been done by your firm with reference to that matter?
A. Well, we have sold what we had.
202 X Q. You have taken no notice of the circular?
A. They all say that they will protect us.
203 X Q. Who will protect you?
A. Eisner & Mendelson said they would protect us.
170 204 X Q. Are you still selling Hunyadi Lajos water in the red and blue label?
A. The water in our hands is in a new label.
205 X Q. Is it that label of "Lajos Forras"?
A. Yes, sir.

206 X Q. Do you know anything about the "Hunyadi Vilmos" water?

A. I have heard of that, yes.

207 X Q. Has your firm ever dealt in it?

A. I think we had an order or two for a case, occasionally, I think in another book I have got that. That came up I think within the last three or four years.

208 X Q. Do you know that that water has been stopped by injunction?

A. I know we couldn't get any more, I didn't know why.

209 X Q. Do you know anything about the "Hunyadi Alajos"?

A. No, I don't recollect that.

210 X Q. Are these books which you have produced here the earliest record of what you can show concerning the sale of Hunyadi Janos and other waters?

A. No, I have got older books.

211 X Q. Do you mean order books?

A. No, the same as those, price books.

212 X Q. Now will you bring us the price book preceding the one which you have brought here?

A. This is 1885.

213 X Q. Have you one previous to 1885?

A. Yes, sir.

214 X Q. I find here an entry in this same price book of 1885 which reads "P. Scherer & Co., Aesculap water, $8, 12–19–'87, one case," now please state what is the meaning of that entry?

A. Just what it says there.

215 X Q. It doesn't suggest anything to me?

A. That is "Aesculap water," that is the name of the water.

216 X Q. What is Aesculap water?

171 A. It is a water, that is all I know; it is a cathartic water, laxative water, the same as the rest of them, used for the same purpose.

217 X Q. Was it a Hungarian water?

A. I don't know whether there was "Hungarian" on the label—no, I don't think so.

218 X Q. You called it Aesculap because you found it on the label?

A. Yes, and that is what it was commercially known as.

219 X Q. That is what gives character to the water?

A. Yes, sir.

Redirect by Mr. RAEGENER:

220 Q. Have you given all the Hunyadi waters that are in these books; if not, please do so?

A. No; I have not; I haven't been asked for them.

221 Q. Please do so?

A. In the 1891 McKesson & Robbins' book I also find "Hunyadi Josef."

By Mr. KNAUTH:

222 Q. Under what date?

A. Somewhere between 1891 and 1896. We never purchased any of it. Here is an order that there was no name on at all, just Hunyadi water; a man down at 29 Broadway offered it for sale for $5. There is also "Hunyadi Ferencz" and "Hunyadi Corvin."

223 Q. By whom was that sold?

A. The "Corvin" was sold by M. J. Traube, 62 Vesey street.

By Mr. RAEGENER:

224 Q. Are you able to state when you made these entries in this book running from 1891 to 1895?

A. No.

225 Q. Coming now to McKesson & Robbins' price book beginning with the year 1885 and running to about 1890, will you please give us the names of other Hunyadi waters not referred to by you?

A. I find "Hunyadi Arpad" of 1886; that is all.

172 ISIDOR HALDENSTEIN, a witness on behalf of the defendant, having first *being* duly sworn, testifies:

By Mr. RAEGENER:

1 Q. What is your name, age, residence, and occupation?

A. Isidor Haldenstein, 206 West 132d street, New York city, manager of the United Agency Company, 503 Fifth avenue.

2 Q. When did you become connected with the firm of Frederick De Bary & Co.?

A. 1880.

3 Q. Were they at that time the agents for the Apollinaris Company, Limited?

A. Yes, sir.

4 Q. And also for Andreas Saxlehner?

A. Not exactly, they were agents of the Apollinaris Company.

5 Q. Did Frederick De Bary & Company handle the Hunyadi Janos water bottled by Andreas Saxlehner at that time?

A. Yes, sir.

6 Q. That is to say, in the year 1888, you, as an employee of Frederick De Bary & Company, commenced to handle the Hunyadi Janos water bottled by Andreas Saxlehner?

A. Yes, sir.

7 Q. How long were you connected with the sale of Hunyadi Janos water bottled by Andreas Saxlehner?

A. From 1880 up to the spring of 1896, March 1896.

8 Q. Always as an employee of Frederick De Bary & Company?

A. No, but always as the agents of the Apollinaris Company—as an employee of the agents of the Apollinaris Company.

9 Q. How long did Frederick De Bary & Company act as the agents of the Apollinaris Company?

A. Up to January, 1889.

10 Q. And after January, 1889, who acted as agent?

A. Charles Graef & Co.

11 Q. In January, 1889, you left Frederick De Bary & Co., and entered the employ of Charles Graef & Company?

A. Yes.

173 12 Q. For how many years have you had full knowledge of the business of selling Hunyadi waters?

A. All the time since the spring of 1880.

13 Q. How long did you have the entire charge of the sale of these waters in the United States?

A. 1883.

14 Q. How was this water always known and sold?

A. As Hunyadi Janos.

15 Q. During the time that you had charge of the sale of Hunyadi Janos water, with how many different Hunyadi waters did you become familiar?

A. About fourteen.

16 Q. Please give the names.

A. Hunyadi Janos, Hunyadi Arpad, Hunyadi Matyas, Hunyadi Laszlo, Hunyadi Alinos, Hunyadi Akos, Hunyadi Lajos, Hunyadi Vilmos, Hunyadi Alajos, Hunyadi Josef, Hunyadi Ferencz, Hunyadi Bela, Hunyadi Miklos and Hunyadi Corvin.

17 Q. How many of these waters were introduced into the United States and had extensive sale?

A. About eleven.

18 Q. How long ago was the Hunyadi Arpad introduced into the United States?

A. I think that was in 1886.

19 Q. How many bottles were imported in 1886?

A. 10,000.

Complainant's counsel protests against the witness holding in his hands and apparently reading his answers from the document in his hands, and which is stated to be an affidavit.

20 Q. In the suit of Emilie Sexlehner against Harry C. Graef and others, pending in the southern district of New York, you made an affidavit, did you not, dated May 26th, 1896?

Objected to as immaterial, irrelevant and incompetent.

174 A. I made that affidavit, but I am surprised as to the date. The affidavit was made this year. The date is a mistake, it should be 1897.

21 Q. You furnished all the facts and data referred to in that affidavit, did you not?

The same objection.

A. I did.

Defendant's counsel states to the witness that notwithstanding the objection, whenever he pleases, for the purpose of refreshing his recollection, if he cannot do otherwise, he may consult that affidavit now here before the examiner.

Complainant's counsel protests against this instruction of the witness as entirely irregular and not authorized.

22 Q. In the year 1890 to what amount had the sale of Hunyadi Arpad increased?

A. Had increased to about 395,000 bottles in 1890.

Complainant's counsel again protests against the witness reading his answer from the affidavit which he holds in his hands, and demands that the witness be examined as to his knowledge and recollection merely; and that only in case the witness should testify that he is unable to answer a specific question put to him without refreshing his memory, he may be allowed in any specific case to thus refresh his memory. In case the caution is not heeded, he moves to strike out the whole testimony of the witness.

23 Q. Coming now to Hunyadi Matyas, please tell us about how many bottles were imported during 1894 and 1895 of this water?

A. About 550,000.

The same protest and objection, and complainant's counsel
175 requests the examiner to certify to the court that the witness is testifying from an affidavit or paper which he holds in his hands, and is reading the answers which he gives from said paper.

(The examiner so certified.)

24 Q. About how many bottles of Hunyadi Lajos were imported into the United States in the year 1895?

A. About 250,000.

Same objection by complainant's counsel and same protest.

25 Q. Have you made a certain table showing the importation into the United States of a number of these Hunyadi waters?

A. Yes, sir.

26 Q. Can you produce a copy of the same?

A. It is in that affidavit.

27 Q. I show you a printed copy here and ask you whether that is a correct copy of the table given in the affidavit?

Objected to as incompetent, irrelevant and immaterial.

A. Yes, sir.

28 Q. How did you compile this table?

The same objection.

A. That was made up from the records in trade papers, the Journal of Commerce, and other investigations.

The table referred to is offered in evidence and marked "Defendant's Exhibit Haldenstein Table."

Complainant's counsel objects to the exhibit as immaterial, irrelevant and incompetent, and moves to strike the same from the files.

29 Q. What was the average importation of the Hunyadi Janos into the United States for eight years prior to 1896?

176 Objected to as incompetent, inasmuch as the witness has not been proved to have the necessary knowledge.

A. About 16,000 cases.

30 Q. What were the importations in the year 1895 of Hunyadi Matyas and Hunyadi Lajos?

The same objection.

A. Matyas, 5,185 cases; Lajos, 5,148 about.

31 Q. Do you know whether in the year 1886 and 1887 the Apollinaris Company, Limited, brought actions in the circuit court of the United States for the southern district of New York, and in the Supreme Court, against the American agents of Hunyadi Arpad and Hunyadi Matyas, seeking to prevent these agents from using the word "Hunyadi"?

A. They did.

32 Q. Do you know whether Andreas Saxlehner was requested to assist in the prosecution of these actions?

A. I was so informed.

Objected to as incompetent.

33 Q. Did he assist in the prosecution of these actions or did he refuse to do so?

A. I was informed that he did not assist.

The same objection.

34 Q. Coming now to the year 1888, were you familiar at that time with the mineral-water trade in the United States?

A. Yes.

35 Q. And since that time?

A. And since that time.

36 Q. Are you able to state whether the use of the word "Hunyadi" alone in the year 1888 and since that time, that is up to the year 1897, was understood by the trade as meaning the mineral water of Andreas Saxlehner?

Objected to as incompetent.

A. Not necessarily.

177 37 Q. What did it mean?

The same objection.

A. Well, one of the various Hunyadis that were on the market during that period.

38 Q. What did the trade understand in 1888 and since by the word "Hunyadi"—as meaning an effervescent water, or what kind of water?

The same objection.

A. An aperient water, coming from the neighborhood of Buda-Pesth.

39 Q. Are you able to state whether the various dealers, wholesale and retail dealers of mineral waters throughout the United States,

in their price-lists advertised other Hunyadi waters besides those of Saxlehner?

The same objection.

A. They listed various Hunyadis in their price currents.

40 Q. How long has this listing of various kinds of Hunyadis gone on by the trade?

The same objection.

A. Since about 1886 or 1887.

41 Q. How were these various kinds of Hunyadi waters advertised and exhibited?

The same objection.

A. As I have said before, in the price-lists of dealers and by show-cards, displayed in windows, and so forth.

42 Q. Are you able to say whether the Hunyadi Miklos and Hunyadi Matyas were exhibited at the World's fair at Chicago?

A. They were.

43 Q. Did they receive any awards?

A. I believe one of them did.

Answer objected to as incompetent and inadmissible.

178 44 Q. Do you remember a water called Hunyadi Arpad?

A. Yes, sir.

45 Q. Do you know whether there was any litigation with respect to that?

A. There was.

46 Q. Between whom?

A. Between the Apollinaris Company and Unger.

47 Q. About when was that litigation?

A. I think it was about 1888.

48 Q. Do you know whether Saxlehner bought up the Arpad spring and caused the importation of the Arpad water in this country to be discontinued?

Objected to as immaterial and irrelevant.

A. I was so informed.

Answer objected to as incompetent.

49 Q. I now call your attention to a certain circular issued by Charles Graef & Company and ask you whether you are familiar with the same.

A. I recognize that circular as one issued by Charles Graef & Company.

50 Q. When was it issued by Charles Graef & Company?

Objected to as immaterial and irrelevant.

A. 1893.

51 Q. From 1893 until when was that circular issued?

The same objection.

A. I don't recollect when we stopped distributing it; it must have been some time prior to March, 1896.

52 Q. In what way was that circular issued—wrapped with each bottle?

The same objection.

A. No, it was distributed by mail to the trade.

53 Q. In what quantities?

179 The same objection.

A. There may have been several thousand issued.

The circular referred to is offered in evidence and is marked "Defendant's Exhibit Graef Circular."

Complainant's counsel objects to the offer and to the exhibit on the ground that the same is not connected with the complainant or his predecessor in business, Andreas Saxlehner, but is apparently a circular which purports to have been issued by Saxlehner's consignees in this country and is for that reason not material, nor competent; it is consented, however, that a copy may be used in place of the original.

54 Q. It is a fact that this last exhibit, the circular referred to, was also published in the daily journals by way of advertisement?

The same objection.

A. It was.

55 Q. At that time Charles Graef & Company were the sole agents in the United States and Canada of the Apollinaris Company, Limited, of London?

A. Yes, sir.

56 Q. And the Apollinaris Company, Limited, had the sole right to sell the Hunyadi Janos water in the United States?

Objected to as incompetent.

A. They had.

57 Q. Now from the year 1880 down to the summer of 1896, what did you and the trade understand the word "Hunyadi" to mean?

Objected to as incompetent.

A. From about shortly after 1886 up to the time you men-
180 tioned, the trade, as well as myself, understood "Hunyadi" to represent one of various aperient waters coming from the neighborhood of Buda Pesth, Hungary.

58 Q. Did you and the trade, from 1886 to the year 1896, understand that the word "Hunyadi" alone meant the aperient water bottled by Andreas Saxlehner?

Objected to as incompetent.

A. No.

59 Q. Have you been subpœnaed to appear here?

A. I have.

60 Q. And do we understand that with the exception of some of the figures referring to the number of bottles and cases imported in any one year, that you have testified from your recollection?

Objected to as being against the record.

A. I have.

61 Q. Have you then, as a matter of fact, consulted the record, that is to say the affidavit, for any other purpose except to ascertain the number of bottles and cases imported by these various concerns during any one year?

Objected to as incompetent.

A. For such figures I have examined my affidavit.

Cross-examined by Mr. KNAUTH:

62 X Q. How long have you been the manager of the United Agency Company?

A. Since September 1st, 1897.

63 X Q. What persons or corporations formed this United Agency Company?

A. The Johannis Company of America, which since some time in August has been the United Agency Company.

64 X Q. Has the Apollinaris Company, Limited, anything to do with the United Agency Company or its formation?

181 A. The United Agency Company are the agents of the Apollinaris Company.

65 X Q. Then the Apollinaris Company, Limited, is still in existence?

A. The Apollinaris Company are doing business in London.

66 X Q. As manager of the United Agency Company, are you still interested in a water called the "Apenta" water?

A. Yes.

67 X Q. Since when have you had anything to do with the sale of Apenta water in this country?

Defendant's counsel objects to this line of examination because it is entirely foreign to any issue in this case, and for the further reason that the witness has been subpœnaed, having refused to appear voluntarily, and it is unfair that he be examined on matters outside of the case, and not proper cross-examination.

Complainant's counsel claims the right to cross-examine the witness on these matters in order to show his position and hostile interests to those of the complainant.

A. I have no objection to saying since March 26th, 1896.

68 X Q. Is not this Apenta water also a Hungarian bitter water offered for sale in the United States in competition with the Hunyadi Janos water and other waters?

A. Yes.

69 X Q. Was not this Apenta water first introduced into the market in this country with a reference on the label on the bottles to "Uj Hunyadi"?

A. To its being bottled at the Uj Hunyadi springs.

70 X Q. When was water so labeled introduced in the markets of this country?

A. March, 1896.

71 X Q. And how long did the use of this label by the
182 Apollinaris Company continue (showing the witness label)?

A. The label shown was in use about six months.

72 X Q. Like this label?

A. I am speaking of this exact label.

73 X Q. Was not, after the expiration of said six months, or about that time, all reference to Hunyadi withdrawn from the label?

A. The reference to Hunyadi was withdrawn from the label as soon after as preparations for doing so could be made, and in this country it was about nine months after March, 1896.

74 X Q. Was it not done in consequence of a decision in a litigation brought by this complainant, Mrs. Emilie Saxlehner, against the Apollinaris Company, Limited, in London?

Objected to by defendant's counsel for the reason that the right of the Apollinaris Company to continue using the word Hunyadi has not yet been adjudicated, and that upon the motion for the preliminary injunction in the case against the Apollinaris Company, before his honor, Judge Lacombe, counsel for the Apollinaris Company insisted on their right to use the word Hunyadi, but said as they had no further use for that word, they had, for the present, given it up.

A. This is not within my own knowledge.

75 X Q. Well, you know that there was such a litigation in England between Mrs. Saxlehner and the Apollinaris Company?

A. I was so informed.

76 X Q. And you also know that there was a decision rendered in that litigation which prevented the Apollinaris Company, Limited, from using the word Hunyadi upon the Apenta water?

A. I don't know that of my own knowledge.

77 X Q. Were there not advertisements sent to you by
183 your principals, the Apollinaris Company, Limited, such as the one which I now show you and will read to you: "Apenta water. In view of the recent decision in the court of chancery, with reference to the use of the word 'Hunyadi' in connection with mineral water, the Apollinaris Company, Limited, beg to inform the trade that they will be pleased to exchange any stock of Apenta water bearing the word 'Hunyadi' on the labels and capsules, for Apenta water with the new labels and capsules from which the word 'Hunyadi' has been omitted. Sole importers: The Apollinaris Company, Limited, 4 Stratford place, Oxford street, London, W."?

A. There may have been; I have no momentary recollection of it; it didn't concern us on this side.

78 X Q. Did you not make any efforts in this country to substi-

tute bottles of Apenta water, not having this mark "Hunyadi" on the labels, for bottles having the mark "Uj" on the labels?

Objected to as incompetent and immaterial.

A. What do you mean by substitute?

79 X Q. Replace?

A. Some of the water having the Uj Hunyadi labels we did in some cases, after we had practically withdrawn the name "Hunyadi;" we didn't like to have two labels on the market, we thought it might create confusion.

80 X Q. It is a fact, is it not, that having used the name "Hunyadi" on the Apenta water in this country for about nine months, you or your company, the Apollinaris Company, Limited, have withdrawn that name from the label?

A. Yes.

81 X Q. Did you not make one or several affidavits for use in the London litigation in opposition to Mrs. Saxlehner's claims?

A. I made one, but I don't know whether it was filed or used.

184 82 X Q. Did you make any affidavits against the claims of Mrs. Saxlehner in the suit which she brought against the firm of Charles Graef & Company, of this city?

A. Yes.

83 X Q. Did you not also make an affidavit in the case to which you have referred, which the Apollinaris Company, Limited, in this city brought against Joseph Unger?

A. I very likely did.

84 X Q. At that time you acted in the interest of the Apollinaris Company, Limited, and in support of the Hunyadi Janos water?

A. In the interest of the agents of the Apollinaris Company.

85 X Q. And those agents at that time were whom?

A. Frederick De Bary & Co.

86 X Q. Will you please look at this affidavit, which purports to be signed by you on October 7, 1886, and state whether you recollect making such an affidavit?

A. That may be a correct copy, of course I couldn't recollect whether that is correct or not, I haven't any very distinct recollection of the affidavit at the moment.

87 X Q. Have you any reason to suppose that these statements are not statements which you then made?

A. I have no particular reason, except that I haven't the original of the affidavit, if one such was made.

88 X Q. I read you the following sentences from this paper, which purports to be a copy of your affidavit of 1886:

"For upwards of six years I have been familiar with the appearance of the bottles in which said water has been received and sold by said firm, and with the stamped metallic capsules with which the said bottles were closed, and the labels of marked and characteristic colors and design upon which the said words 'Hunyadi Janos' were displayed. The said bottles, capsules and labels have, at all

times during this period, been the same as those now in use
185 in connection with said water." Was that statement at that time, in October, 1886, true, supposing that you made it?

A. That was substantially correct so far as I can now recollect.

89 X Q. You have a very distinct recollection of this litigation, have you not?

A. Of the litigation as a whole, yes, quite so.

90 X Q. Did you have anything to do with getting up the facts for the purpose of bringing this litigation?

A. Yes.

91 X Q. Did you compile any facts for your attorney, Mr. Melville?

A. I prepared some of the material.

92 X Q. And you know that the firm of Frederick De Bary & Co. brought such a suit in the circuit court of the United States for the southern district of New York against Joseph Unger?

A. You say Frederick De Bary, I thought it was the Apollinaris Co.—the Apollinaris Co. brought the suit.

93 X Q. And Frederick De Bary & Co. acted as their agents in bringing the suit?

A. No; they may have assisted him as agents, but they didn't bring the suit; counsel brought the suit for the Apollinaris Co.

94 X Q. Don't you know that Mr. Adolphe De Bary swore to the complaint?

A. He probably did, because the Apollinaris Co. weren't here, and there was no officer of the company here.

95 X Q. So far as the company's interests were concerned in this country, they were entirely represented by Frederick De Bary & Co. at that time?

A. Frederick De Bary & Co. were the selling agents of the Apollinaris Co., and assisted the counsel of the Apollinaris Co. in this matter.

96 X Q. Now, I will read to you some statements made in this suit of the Apollinaris Co., Limited, against Joseph Unger,
186 by the pleading which purports to be the bill of complaint of the Apollinaris Co., Limited.

Defendant's counsel objects to testimony of this kind for the reason that this witness was only an employee of Frederick De Bary & Co., who in turn were only employees of the Apollinaris Co.; that this witness' testimony at best can be but hearsay and opinion evidence; that it is not the best evidence; that the pleadings speak for themselves, and that the testimony is incompetent and immaterial.

97 X Q. (continued). "That the said company, upon receiving said grant, entered largely into the enterprise of exporting said water to the United States, and established, conducted and built up a large traffic and business in exporting to the said United States and vending therein said water, and has at all times ever since used and now uses the said trade-mark in said business, and a label, as hereinafter stated, on each bottle, showing the same with marked

and characteristic colors and devices. The bottles where said water is so transported and sold are uniform and peculiar in size, shape and appearance, and each of them has, besides the label, a stamped metal capsule and other characteristics distinguishing said bottle, and will clearly appear from specimens of the same produced in court." Were these statements true about the Hunyadi Janos water as then known to you in the fall of 1886?

A. I could not have made those statements which are recited from that bill of complaint of my own knowledge.

98 X Q. Please state what in these statements went beyond your knowledge.

A. The statement that the Apollinaris Co. "received the said grant," as this grant, if given, was given prior to 1880.

187 99 X Q. Is the statement which I read to you correct otherwise?

A. I can only speak generally from 1880.

100 X Q. Yes?

A. That is my answer.

101 X Q. It is correct from that time on?

A. Substantially.

102 X Q. Did you know the Hunyadi Janos water since 1886 as the same was sold by the Apollinaris Company, Limited, in this country, under a red and blue label, of which a specimen is before you?

A. The label and the bottle shown me is similar to the one used in 1886, but the label then used had the following statement: "Sole exporters: The Apollinaris Company, Limited, London," and some other printed matter.

103 X Q. Had it not also the following statement, "Imitation of this water or of the label, or of the capsule, will be subject to legal proceedings at the instance of the Apollinaris Company, Limited, 19 Regent street, London"?

A. Those words, or similar words.

104 X Q. And in carrying out the notice thus given on the label, the Apollinaris Company commenced this suit against Joseph Unger, did it not?

A. I cannot speak with knowledge as to what grounds the Apollinaris Company had in its mind in bringing that suit.

105 X Q. Do you know whether or not the Apollinaris Company, Limited, was instrumental in causing the name "Hunyadi" to be registered as a trade-mark for Mr. Saxlehner in the United States Patent Office?

A. I do not.

106 X Q. In this complaint it is stated, "That through the efforts, expenditures, and investments of your orator, the said water has become widely known in the United States, and is at present sold therein by your orator and its vendees, in very large quantities." Was that true in 1886?

188 A. That statement as to the Apollinaris Company I believe to have been correct.

107 X Q. It further says, "That by reason of the said sales by

your orator, and the said words upon the said label by it adopted as aforesaid, dealers in mineral waters, and the purchasers and consumers of said water generally, have come to know, and have known, that your orator has the exclusive right in said United States to furnish and sell the said mineral water under the said trade-mark 'Hunyadi Janos' and under the said label, and that the water so furnished and sold by your orator in the said United States is procured directly from the spring or wells aforesaid, and therefore to rely upon the said label, and said trade-mark, and upon the fact that said water, so marked and labeled was, and had been, furnished and sold by your orator, as an assurance and guaranty of the genuineness, strength and purity of the said water, and your orator alleges that said assurance and guaranty was of great value to your orator and to said dealers and consumers." Was that true?

Dependant's counsel again objects to this reading of pleadings in a suit to which the witness was not a party and to any interrogations on that subject.

A. The statement read from a bill of complaint that was not signed by me, may have been correct at that time, 1886.

108 X Q. Now was it not true?

A. I suppose it was.

109 X Q. You had something to do with the advertising of the Hunyadi Janos water in this country, didn't you?

A. At what period?

110 X Q. Since 1880.

A. Indirectly, I didn't place it.

189 111 X Q. Didn't you have complete charge of the Hunyadi Janos business since 1883?

A. As to the advertising, that was placed by the Apollinaris Company.

112 X Q. You mean directly from London?

A. And they authorized the advertisements and practically attended to it.

113 X Q. Did they not write to Frederick De Bary & Company as to what advertisements should be made?

A. Yes, sir.

114 X Q. So these matters went through the hands of Frederick De Bary & Co., did they not?

A. Substantially so.

115 X Q. You were acquainted with the advertising?

A. Do you mean the wording of the advertisements?

116 X Q. I don't mean with the detail, I mean with the fact that advertising was done on a liberal scale?

A. Advertising was done by the Apollinaris Company of the Hunyadi Janos water.

117 X Q. Now the complaint continues by stating, "and that said water so sold by your orator has come generally to be known and designated by the trade, so called, and by purchasers and consumers, by the first and characteristic words of the said trade-mark, 'Hunyadi,'

the 'Janos' being comparatively seldom used in common parlance." Was that correct as a fact in 1886?

A. So far as I recollect, even in 1886 the word "Janos" was used in the orders of the customers of Frederick De Bary & Co.

118 X Q. Now will you please answer the question which I put to you?

A. Your question applies to the whole paragraph?

119 X Q. Yes.

A. I wouldn't make the statement as strong as it is in the bill of complaint, signed by Mr. De Bary.

120 X Q. How far would you go in making the state-
190 ment?

A. That some customers, knowing that Frederick De Bary & Co. handled no other Hunyadi water, at times describe the Hunyadi Janos water in giving their orders to the firm of De Bary & Co. by the single word "Hunyadi."

121 X Q. Is it not a fact that up to the fall of 1886 there was no other bitter water imported to this country and sold in this market, which bore the name "Hunyadi" except Hunyadi Janos water?

A. I had known of no other Hunyadi water, up to 1886, imported into this country, other than that which was brought here by either the Apollinaris Company or through the indirect importation of Andreas Saxlehner.

122 X Q. You mean that there was, besides the water sold by the Apollinaris Company, also the Hunyadi Janos water in the market, which was purchased of Andreas Saxlehner in Europe, and sold in this country?

A. That there was Hunyadi Janos water other than that which Frederick De Bary & Co. imported, and which was supposed by me to have been sent here by European houses with the knowledge of Andreas Saxlehner.

123 X Q. Now, aside from such other Hunyadi Janos water, was there any other bitter water in the market which bore the name "Hunyadi" in any connection whatever, up to the time of an importation of Hunyadi Arpad water, made in the fall of 1886?

A. I didn't know of any other.

124 X Q. Then if the public here and dealers or consumers of bitter water spoke of "Hunyadi" water in the United States previous to 1886 they referred necessarily to Hunyadi Janos water, did they not?

A. I so understood it up to about 1886.

125 X Q. Now, in 1886 there was an importation made of a water called Hunyadi Arpad, as you have stated, and the Apol-
191 linaris Company, Limited, brought this suit against the importer; do you know whether an injunction was obtained against this importer in this city?

A. An injunction was obtained but subsequently dissolved.

126 X Q. Do you know whether the defendant, Joseph Unger, interposed a defence to the suit, by affidavit or otherwise?

A. I understood that he defended it thoroughly.

127 X Q. Do you know upon what facts he relied to contest the claim of the Apollinaris Company in this suit?

A. I was informed that he relied upon the condition of the trade-mark laws in Hungary.

128 X Q. You mean that Mr. Saxlehner was unable to enforce an exclusive right to his name and his labels in Hungary, and therefore should not be heard in this country to enforce it?

Objected to as clearly incompetent.

A. I couldn't make an answer to that.

129 X Q. You don't know that sufficiently to state as to what the defense was?

A. I understood that the defense was——

Defendant's counsel again objects to this line of cross-examination as immaterial and irrelevant and as merely hearsay and secondary evidence.

A. (continued). I understood that the defense was that Saxlehner had no rights to the name "Hunyadi" in the country of its origin.

130 X Q. Do you know what the laws of Hungary were at the time with reference to the protection of trade-marks and labels there?

A. No.

131 X Q. Is it not a fact that this importation of Hunyadi Arpad in 1886 was of very slight extent?

A. It consisted of about 10,000 bottles, and as an initial shipment was certainly a large one.

192 132 X Q. That is, it was an importation of 201 cases?

A. 201 cases.

133 X Q. Now, in 1887, was there any Hunyadi Arpad imported into this country to your knowledge, or any other water bearing the name "Hunyadi" besides Hunyadi Janos?

A. Not that I know of.

134 X Q. What personal knowledge have you of the importation of Hunyadi Arpad and the various other waters which you have named, all bearing the name "Hunyadi" in some connection or other, aside from Hunyadi Janos, and from which you have made up the table of importations which has been offered in evidence?

A. From a general conduct of the business—I guess that answers your question.

135 X Q. No, I am asking you as to personal knowledge?

A. A study of the papers from which this list was made, from time to time, as these papers were published—notably the Journal of Commerce.

136 X Q. Did you see the bottles when they were imported and count them?

A. I saw a great many of the bottles.

137 X Q. Did you count them?

A. Not in each case, no, but that was not necessary to enable me to make a competent estimate.

138 X Q. As I understand the situation, the table made up by you is made up from such entries in the Journal of Commerce and other similar sources of information as were then within your reach?

A. And others which have not been described by counsel in questioning me, nor in my previous answer.

139 X Q. But they were of a similar character?

A. By examination of cases as they were discharged on the dock from the steamers, and by seeing the goods in the stores of dealers, particularly the importers, and by the reports in papers such
193 as make a specialty of announcing the importations of mineral waters, and reports of my subordinates, including travelers who had very many opportunities for observation.

Complainant's counsel renews his objection to Defendant's Exhibit Haldenstein Table, upon the grounds before stated.

The WITNESS: I would like to complete my answer, by saying that in some instances the information came direct from the importer.

140 X Q. Did you notice any falling off of the business of Hunyadi Janos water by the importation of the other waters named "Hunyadi"?

A. There may have been a falling off, or, possibly, not an increase in the sale.

141 X Q. Is that your recollection upon the matter?

A. That is my recollection at the moment.

142 X Q. You would naturally have expected an increase in the sales from year to year, would you not?

A. I think that is too broad a question, as a good many things could affect the sale outside of these other Hunyadi waters.

143 X Q. Was the Hunyadi Arpad water advertised in this country?

A. Yes.

144 X Q. Can you point me to any such advertisements?

A. I haven't them here, but I think they are in the exhibits in the case of Saxlehner *vs.* Graef.

145 X Q. You mean advertisements in daily papers?

A. I have seen advertisements of Hunyadi Arpad, large and conspicuous advertisements, in a leading drug journal for instance.

146 X Q. Have you seen any such advertisement of the Hunyadi Lajos water?

A. I have seen an advertisement of Hunyadi Lajos.

147 X Q. One?

A. I believe there was a small sign, it may have been a cardboard sign.

194 148 X Q. Have you seen any advertisements of Hunyadi Lajos water in daily newspapers?

A. None that I recollect.

149 X Q. Have you seen any in weekly papers or magazines?

A. I don't recollect any.

150 X Q. Is it not a fact that all these waters which have been imported since about 1888, were sold at less prices than the Hunyadi Janos?

A. I always understood that they were.

151 X Q. Is it not a fact that all of them bore labels which were similar to the blue and red label of the Saxlehner water?

A. That is a matter of opinion.

152 X Q. Yes?

A. You are speaking of waters imported in this country. There may have been a water imported that I have never seen, that is possible too.

153 X Q. I confine my question to those you have testified to?

A. For instance, I don't recollect that "Corvin" label. Most of the waters mentioned in the table and referred to, and probably all, had blue labels, which, as to their color and some other respects, were similar to the Hunyadi Janos labels.

154 X Q. Did not all these labels, or those which you recollect of them, show substantially the same division into three panels, the middle panel being red, while the side panels were blue or bluish?

A. That applies to nearly all, if not all of them.

155 X Q. Now, previous to this importation of Hunyadi Arpad water, was there a bitter water known to you in this market here, which had a label of blue and red color, in any way similar or substantially like the label of the Hunyadi Janos water?

A. Previous to 1886?

156 X Q. Yes, previous to the Arpad?

A. I wouldn't like to say that there wasn't a single water.

195 I was thinking of the "Aesculap," I forget whether that was imported before or not; I don't recollect any at the moment.

157 X Q. Do you recollect any bitter water previous to 1886 which was imported into this country in bottles of the same style as those used for Hunyadi Janos water, with a long straight body and short neck, and a capsule on it?

A. I think there was some, certainly.

158 X Q. Which do you recollect?

A. Some waters from the neighborhood of Buda Pesth, and "Friederichsall," and there may have been others.

159 X Q. Do you consider a bottle of "Friederichsall" water similar to the Hunyadi Janos water?

A. Yes, similar.

Adjourned to Monday, November 29, 1897, at 11 a. m.

SAXLEHNER
vs.
NIELSEN.

NEW YORK, *November* 29, 1897.

CHARLES O. WEISZ, recalled for further cross examination:

By Mr. KNAUTH:

226 X Q. Have you brought with you today an older price book of the firm of McKesson & Robbins, showing the sale of any mineral water by said firm?

A. I have.

227 X Q. When do the entries in this book which now is before you commence, and for what years do they run?

A. Well, this book dates back to 1870.

228 X Q. And how far do the entries in it go—I mean to what year?

A. 1880.

229 X Q. Do you find in this book any entries of the sale of "Hunyadi Janos water;" if so, please state what you find?

A. Yes, a number of them.

196 230 X Q. When do you find the first entry?

A. That is very indistinct, but we will decide that it is 1876, because the following one is 1877. The entry is "Hunyadi Janos."

231 X Q. Do you find in the entries relating to this order any statement as to the particular shipment being "blue label," or "red label"?

A. Well, there are entries here "red" and "blue," yes.

232 X Q. But all of "Hunyadi Janos water"?

A. Yes.

233 X Q. Do you also find among the same entries some which are simply called "Hunyadi"?

A. On that same entry, no.

234 X Q. What is the meaning of the entry just below those of "Hunyadi Janos water," which is marked "Hunyadi," and then follow several numbers of cases, &c.?

A. That is half cases, twenty-four bottles.

235 X Q. Those were orders of "Hunyadi Janos water"?

A. Yes, sir.

236 X Q. Do you find also on the same page, and marked for the year 1879, any sales of "Hungarian bitter water"?

A. "Hungarian water," yes.

237 X Q. Entered under what name?

A. Just "Hungarian."

238 X Q. Is that the water which you call "Hungarian water" (showing bottle to witness)?

A. I think not.

239 X Q. Can you state more explicitly what the "Hungarian water" was which you find entered under the name "Hungarian" in your book?

A. My recollection is that it was "Friederichsall Hungarian bitter water."

240 X Q. Do you know whether or not the "Friederichsall bitter water" is a Hungarian water?

A. That I couldn't say.

197 241 X Q. You have stated only your impression as to it?

A. That is all.

242 X Q. Do you know this water of which I have shown you a specimen?

A. I don't recognize the label, no.

243 X Q. Do you find also in a book previous to the price book shown by you, under date of 1875, any entries of the sale of "Hunyadi Janos water" by your firm?

A. Yes.

(Examination closed.)

CHARLES O. WEISZ.

ISIDOR HALDENSTEIN—cross-examination continued.

By Mr. KNAUTH:

159 X Q. Did you ever know the "Hunyadi Janos water" in this country under the expressions "Hunyadi blue label" and "Hunyadi red label"?

A. "Hunyadi Janos" was at one time referred to as "Hunyadi Janos blue label" and "Hunyadi Janos red label," this being due to the importations which were made, not by the Apollinaris Co. or its agents, but, as I have understood, by Andreas Saxlehner, in violation of his contract with the Apollinaris Co.

That part of the sentence beginning with the words "this being due," is objected to as not responsive, volunteered, and incompetent.

160 X Q. The red label of the "Hunyadi Janos water" was which label, can you describe it?

A. It is the label on the bottle shown me.

Complainant's counsel offers in evidence the specimen bottle shown to the witness, and the same is marked "Complainant's Exhibit Saxlehner's European Bottle."

198 161 X Q. You make quite a point in answering my question in saying the water was known as "Hunyadi Janos blue label," or "Hunyadi Janos red label." Do you mean that the water was not referred to as "Hunyadi blue label" or "Hunyadi red label"?

A. As this was prior to 1886, it may have been occasionally referred to as "Hunyadi blue label" or "Hunyadi red label," but it was chiefly spoken of as "Hunyadi Janos," blue, or red label, as the case may be.

162 X Q. How would you understand the entries in the books which the defendant's witness Weisz has just presented, referring to Hunyadi blue label" and "Hunyadi red label" on the part of McKesron & Robbins?

Objected to on the ground that the witness' understanding of McKesson & Robbins' books is incompetent.

A. Might I see those books, are they here?

Mr. KNAUTH: No.

The WITNESS: I shouldn't like to answer without seeing the books. I am perfectly willing to reply as directly as possible.

163 X Q. If you were to see any entries in the books of the mineral-water sellers in this city, dating previous to 1886, and referring to "Hunyadi red" or "Hunyadi blue" label, what would you understand such entries to mean?

A. I think your question is too broad. In the first place, they may be private books, as in the case of Mr. Weisz, and the authors of them may have had special reasons for describing that water, or any other, by certain expressions.

164 X Q. Is there anything known to you which would lead you to infer that any other but "Hunyadi Janos water" was
199 meant by such reference?

A. Prior to 1886, in the United States, probably no other water was referred to; but there may have been an importation of some other "Hunyadi water" prior to that time that I don't know of; because Saxlehner in his own advertisements, in about 1878, spoke of other "Hunyadi waters."

165 X Q. But you don't know of any such importations into this country?

A. None prior to 1886, to my knowledge.

166 X Q. Your opinion does not quite tally with that expressed by Mr. Adolph De Bary, and also Mr. Prince, the manager of the Apollinaris Company, who both have stated emphatically that the "Hunyadi Janos water" was commonly known and referred to as "Hunyadi water;" or do you wish to modify your testimony?

A. I see no occasion to modify my testimony.

167 X Q. Mr. Prince in his affidavit in support of the action against Andres, said: "I have in my possession a very large number of orders from mineral-water dealers in England for 'Hunyadi Janos water' by the name of 'Hunyadi' alone, and by such orders the said dealers meant the company to supply, and the company has supplied 'Hunyadi Janos' water." Did you not also receive such orders here to a large extent?

A. Up to about 1886 or 1888, orders came in to Frederick De Bary & Co., who handle no other Hungarian aperient water than "Hunyadi Janos," for "Hunyadi," as well as for "Hunyadi Janos."

168 X Q. John R. Agnew, an employee of Park & Tilford, has testified that his firm always knew the "Hunyadi Janos water" as "Hunyadi water," and frequently ordered it of your company as

"Hunyadi." Do you mean to say that this was not the case after 1888?

200 A. The agents of the Apollinaris Company have not received any order for "Hunyadi Janos" from Park & Tilford for somewhat over a year; and I have no recollection of seeing any order of Park & Tilford for "Hunyadi Janos" for a long number of years, as they did not necessarily come under my observation, Park & Tilford presenting their orders, not at the agents' office, but at the office of the warehousemen.

Defendant's counsel objects to this manifestly unfair way of trying this case, in that complainant's counsel is substantially reading into the record, at least by way of inference, the testimony supposed to have been given by a great number of more or less important persons and firms, as to which defendant's counsel has no knowledge whatever. It would seem that this testimony, read into the case in the shape of questions, could much better be given in rebuttal, when defendant's counsel would have an opportunity of cross-examining witnesses. The witness on the stand is not a friendly witness, he was subpœnaed, and there are more important cases before the court, involving the main question, that is, the right to use the word "Hunyadi." Defendant's counsel upon the motion for a preliminary injunction called the court's attention to the fact that there were more important alleged infringers, and that it was manifestly unfair to make the least important infringer the scapegoat.

169 X Q. Did the agents of the Apollinaris Co. advertise in this country the "Hunyadi Janos water," calling special attention to the blue and red label under which the same was sold here by such agents, in contradistinction to the red and white label put on the bottles sold in Europe?

201 Question objected to on the ground that the advertisements themselves are the best evidence, and that the witness' testimony at best can be but hearsay, and he can give his recollection of alleged advertisements which may or may not have appeared in newspapers.

A. I believe that up to about 1887, there were advertisements of "Hunyadi Janos" simply calling attention to the blue label, but I am not momentarily positive of this. I could readily identify any advertisements, if such were shown me.

170 X Q. If it was your impression during those years that Saxlehner connived at the importations of "Hunyadi Janos water" with the red and white label, did you, or the firm of Graef & Co., or the Apollinaris Co., do anything with reference to that matter?

A. I was informed through the Apollinaris Co., that the Apollinaris Co. protested very seriously, to Mr. Saxlehner, against such alleged violation of the contract.

171 X Q. Have there not been several litigations between Saxleh-

ner and the Apollinaris Co. about these various matters arising under their contract?

A. I have been so informed. One such litigation, which was indirectly directed against Saxlehner, or at least against Saxlehner's alleged violation referred to above, was the suit of the Apollinaris Co. against P. Sherer, John Mathews, and others, who imported so-called red-label "Hunyadi Janos," which cases were decided by Judge Wallace.

172 X Q. What was the name of the spring from which the "Apenta water" is now drawn?

A. As shown by the printed record in the case of Saxlehner against the Apollinaris Co., in London, before Justice Kekewich, the
202 "Apenta water" was drawn from a group of springs which had the name of Uj Hunyadi springs.

173 X Q. What is the meaning of "Uj," if you know?

A. I understand it to mean "new."

174 X Q. Do you know when these springs were named "Uj Hunyadi" springs, and by whom?

A. I don't know anything about this matter of my own knowledge, and it is all a matter of record in the various proceedings.

175 X Q. Was one of those springs also called the "Uj Janos" or "New Janos" spring?

A. I am absolutely without any knowledge on that point.

176 X Q. Have you ever been familiar with the mineral water which was formerly drawn from these springs, and known as "Racoczi water" in the market?

A. No.

177 X Q. Were you last year informed by the Apollinaris Co., or anybody else, that the name "Uj Hunyadi" had been forbidden by authority in Hungary to be used on mineral water?

Objected to by defendant's counsel, on the ground that whether or not such information came from Hungary, it cannot have any bearing on any issue in this case, especially as the Hungarian laws are different from ours, and the facts in the Hungarian litigation were entirely different from the facts in this case.

A. I had been informed that late in 1896, Saxlehner had succeeded in obtaining a decision, or an edict, from the minister of one of the Hungarian departments, to the effect that the word "Hunyadi" could no longer be used by the numerous bottlers of Hunyadi waters, who had been using it for a score of years, with the exception of Saxlehner.

203 178 X Q. You have testified that the name "Hunyadi" has become a generic name in this country; when did it become generic?

A. I have testified that it was generic in the United States at the time, and also somewhat before the time, that the "Apenta water" was introduced into this country, March, 1896.

179 X Q. Was it always generic?

A. No.

180 X Q. Well, now, won't you state when it became generic, if you know?

A. That must have been a gradual process, and certainly it has been a generic term for several years, as is shown by price-lists throughout the United States of the principal wholesalers and retailers quoting the various waters openly, and by the advertisements of the other Hunyadi waters—these different names reached the consuming public, and these facts in themselves are evidence of the generic character of the name.

The part of the answer beginning with the words "as is shown" objected to as not responsive and argumentative.

181 X Q. What do you mean by the word "generic"?

A. In this instance, as describing a class of waters.

182 X Q. You mean descriptive?

A. Yes; practically so.

183 X Q. Now, how was this class of waters distinguished from other Hungarian bitter waters?

A. For the period I am speaking of, all the Hungarian bitter waters came in with the word "Hunyadi" as part of their name, with the exception of "Apenta."

184 X Q. I am not speaking of what came in, but of what was sold in this country. Was not this water continuously on the market, of which I now show you a specimen?

A. I am not aware that this "Royal Hungarian bitter water" of Eisner & Mendelson Company was imported after 1888; and if it was not, it does not come within the period that I have been referring to in my answers.

204 185 X Q. That does not meet my question; I was not speaking about importations, but asking you as to what was sold in this country; now will you please answer the question?

A. I overlooked the point you make, and now answer that, I am not aware of its sale in the United States after 1888.

186 X Q. Have you known the "Franz Josef water" on sale in the United States, and if so, during what years?

A. My recollection is not very perfect as to the years "Franz Josef water" was on sale, it was probably not later than 1889, but I believe that this same water was on sale in more recent years as "Hunyadi Joseph." There was a "Hunyadi Joseph" on the market.

187 X Q. Is that a bottle of the "Hunyadi Joseph" to which you refer?

A. I think that is the "Hunyadi Joseph" which I mean as having been imported by Hossfield & Wierl, among others.

188 X Q. Was the "Hunyadi Joseph" of which you saw bottles in this market imported by this firm of Hossfield & Wierl?

A. I understand that that firm and another imported such water, but whether the bottles which I saw in the show-windows of retailers came from one or the other of the firms, I am unable to say.

189 X Q. What reason have you to believe that this "Hunyadi

Joseph" water was the same as the "Franz Josef" water which has been on sale here for a number of years?

A. It is a matter of general repute among mineral-water importers, and so I understood from Hossfield & Wierl.

190 X Q. Who imported the "Franz Josef" water here, if you know?

Objected to by defendant's counsel, as this is entirely outside of the direct examination, is no cross-examination, and is evidently evidence that the examining counsel desires for other purposes not connected with any of the issues in this case.

205 Complainant's counsel answers that he has no intention of that kind whatever but intends to strictly cross-examine the witness on the matters of the direct examination.

A. I cannot from memory say who the various parties were. I think at one time it was imported by a gentleman connected with the Morris European express.

191 X Q. How long have you known it on the market?

A. I never paid particular attention to "Franz Josef" as its sale has at no time been important. As "Franz Josef" it was only on the market for about the time stated in my previous answer. It may be now on the market again under that name.

192 X Q. You mean you have not seen it on the market except during the time stated by you?

A. That is my recollection of it, exactly.

193 X Q. Is the bottle which I now show you a specimen of such "Franz Josef" water?

A. I don't recognize the label shown me as the label which I saw years ago.

194 X Q. Would not the differences of the analyses on the labels of the two waters convince you at a glance that the two waters were different—I mean the "Franz Josef" and the "Hunyadi Joseph"?

A. Not necessarily.

195 X Q. Why not?

A. I can't vouch for the correctness of the analysis in either case; the water may have undergone changes in composition in the course of years.

196 X Q. But you do see, don't you, that on the labels, the "Franz Joseph" water has about equal parts of sulphate of magnesium and sulphate of sodium, while the "Hunyadi Joseph" water has twenty-one parts of sulphate of magnesium, and seventeen parts of sulphate of sodium?

A. I notice the proportions of the analysis which counsel points out to me, but this gives no reason for modifying my previous answer.

206 197 X Q. Does the "Apenta" water vary in some degree as to its constituents, as you have just claimed for these waters?

A. The "Apenta" does not. I simply wish to show that I have no knowledge as to the constituents of the "Franz Josef" water.

198 X Q. And you may have no knowledge of the fact whether or not the "Hunyadi Joseph" is the same?

A. None other than I have described in my replies.

199 X Q. Now, have you ever heard the "Franz Josef" water sold in this country as a "Hunyadi" water, or under the name of "Hunyadi"?

A. My answers show that "Franz Josef" water, so far as I know anything of it, was sold in the United States prior to about 1889, and the name "Hunyadi" had at that time only begun to become generic.

200 X Q. Do you mean that "Franz Josef" water has not been sold in this market since 1889?

A. Its sales have at all times here been very insignificant, and my answers are correct to the very best of my knowledge.

201 X Q. That does not answer my question.

A. Well, I am willing to answer it.

202 X Q. Has the "Franz Josef" water been sold in this country since 1889, if you know?

A. I think that the "Franz Josef" label disappeared about 1889.

203 X Q. Did it appear again on the market afterwards, and if so, when?

A. I am not aware that, as "Franz Josef," it ever reappeared, but the water appeared under the name of "Hunyadi Joseph."

204 X Q. And when was that?

A. I couldn't give the date with any exactness.

205 X Q. Not even the year?

A. No, I couldn't give it without reference to books.

206 X Q. Was the "Apenta" water ever sold by you as a "Hunyadi" water?

207 Defendant's counsel objects to the question as unfair; that there is a case pending between the same plaintiff and the Apollinaris Co., who deal in "Apenta;" the witness will be in the city of New York, and it would be fairer to try the "Apenta" case at the proper time, and not in connection with this case. If the witness refuses to answer, defendant's counsel will certify the question to the court.

Complainant's counsel answers, that the witness has testified that the name "Hunyadi" was a generic name at the time of the commencement of this action, and the question as to whether he has sold, or whether he sold "Apenta" water as "Hunyadi" water is therefore a perfectly pertinent question.

Defendant's counsel says, no, it is not. One of the issues in the "Apenta" case is that the Apollinaris Diamond is the property of Saxlehner and also that one of the issues in that case is whether the public have not been deceived into purchasing "Apenta" water as and for the real "Hunyadi" water, and it is unfair to try that issue here.

A. "Apenta" water was sold and extensively advertised by the agents of the Apollinaris Co. as "Apenta" water, that being its name,

and for a short time the labels gave the descriptive expression that the water was bottled at the "Uj Hunyadi springs." This expression, whenever used, was simply descriptive.

207 X Q. Did you ever sell "Apenta" water when "Hunyadi" water simply was demanded?

A. During the period that I have described in my last answer, "Apenta" was new to the trade, and when Charles Graef & Co. received an order for "Hunyadi," we invariably asked the dealer which "Hunyadi" he desired, and executed his order according to his reply; so that "Apenta" was never sold by Charles Graef & Co. for "Hunyadi Janos."

208

208 X Q. Would, in your opinion, a druggist be justified in selling a bottle of "Apenta" water to the consumer who demanded a bottle of "Hunyadi" water at his store, without explanation?

Objected to as incompetent; this witness is not a public censor as to what druggists should or should not do. But, if complainant's counsel desires to have the opinion of defendant's counsel on that subject, which said opinion would not in any way compromise or affect the "Apenta" suit, defendant's counsel expresses it as his opinion, without qualification, that druggists would be justified, without question, in selling a bottle of "Apenta" water as "Hunyadi" water, for it is "Hunyadi" water.

A. I think the question is irrelevant, and I decline to answer.

209 X Q. You have stated heretofore that the name "Hunyadi" in your opinion described a certain class of waters from the neighborhood of Buda Pesth—has locality anything to do with that name?

A. Yes.

210 X Q. Would you call a water from a remote portion of Hungary a "Hunyadi" water?

A. Not a remote portion, but the question is, what is meant by the word "remote."

211 X Q. What portion geographically do you refer to when speaking of "Hunyadi"?

A. A somewhat indefinite portion, described generally as "the neighborhood of Buda Pesth."

212 X Q. Then a water coming from Transylvania, you would not call a "Hunyadi" water, or would you?

A. I don't know the geographical divisions of Austria well enough to answer by such a description of locality as counsel gives.

209

213 X Q. Do you know where the "Hunyadi Lajos" water comes from?

A. I should think it comes from within 100 miles of Buda Pesth.

214 X Q. Do you know from what spring it comes?

A. I don't recollect, if I ever knew, except that I suppose the spring is named "Hunyadi Lajos." I have understood that the spring or wells were named "Hunyadi Lajos" up to the time of the decision of the Hungarian minister, late in 1896.

215 X Q. Is it not a fact that there was a very large demand created in this country for "Hunyadi" water by the introduction

and energetical promotion of the business by the Apollinaris Co., until these competing waters came in?

A. The Apollinaris Co., not as the agent of Saxlehner, but under their contract with Saxlehner, advertised "Hunyadi Janos" and created a large demand for it in the United States.

216 X Q. I was asking you whether it created a large demand for that water under the name of "Hunyadi" water, that was the question?

A. The demand spoken of by me existed variously under the name of "Hunyadi" or "Hunyadi Janos," or "Saxlehner's bitter water."

217 X Q. Is it not apparent to you that if anybody gave to a spring of bitter water in Hungary a name, employing "Hunyadi," and adopted a blue and red label of some similarity to that of Saxlehner's that he could at once dispose of very large quantities of such water in this country, without advertising?

A. I decline to answer that question.

218 X Q. Can you state whether the "Hunyadi Arpad" was ever advertised in the daily papers?

A. I know it was advertised, and, as I thought, advertised openly, but I don't recollect any newspaper advertisements, that water being now out of the market some years.

219 X Q. You mean you recollect trade-paper advertisements?

A. I recollect advertisements and reading matter of "Hun-

210 yadi Arpad" in trade papers, such as were set out in my affidavit in Saxlehner against Graef.

220 X Q. Will you state which of the waters to which you have referred in your schedule of importations you have found personally on sale in the United States?

A. "Hunyadi Arpad," "Hunyadi Matyas," "Hunyadi Laszlo," "Hunyadi Lajos," "Hunyadi Vilmos," "Hunyadi Alajos," "Hunyadi Josef," "Hunyadi Bela," "Hunyadi Miklos," and "Hunyadi Corvin."

221 X Q. Which of these do you know still to be on the market?

A. "Hunyadi Matyas," "Hunyadi Lajos," "Hunyadi Vilmos," and there may be others as I have not been following the Hunyadi sales very closely of late. "Hunyadi Arpad" and "Hunyadi Bela" have not been on the market for some time, as Saxlehner advertised in 1894 that he had purchased these springs, and described them by these names.

The last sentence is objected to as volunteered and not responsive, and as incompetent.

222 X Q. Are you not aware of the fact that the further importation of "Hunyadi Vilmos" and "Hunyadi Alajos" has been stopped by injunction in this country against the importer of these waters?

A. If injunctions were obtained against the importers of these waters, I am quite sure it was through consent of the defendants and not the result of a contest; but these waters can still be on sale

in the hands of the retailers who bought before the cessation of importations, which counsel says has taken place.

Answer objected to as not responsive.

223 (222 X Q. repeated).

A. I haven't learned of any importations in the last few months.

224 X Q. How long have you known of the sale of a Hungarian bitter water in this market styled "Hungaria"?

211 A. I haven't known of the importation of such water since at least 1893, it coming here under the name of "Hunyadi Miklos" until some time in 1897, and thereafter it was imported under the name of "Hungaria."

The first part of the answer objected to as not responsive.

225 X Q. Since what time in 1897 have you known of the importation of water called "Hungaria"?

A. Without reference to books I can't give the exact months, but it was probably the beginning of 1897, as I understand it was after the decision in Hungary given late in 1896.

226 X Q. Do you know from what part of Hungary that water comes?

A. I don't know the exact location of the wells from which it is drawn.

227 X Q. Is that water now sold in the market as, or called by the trade, a "Hunyadi" water?

A. As its sale is very insignificant in this market, I can't speak from knowledge.

228 X Q. You said in your answer to question 57, that from about shortly after 1886, up to the summer of 1896, the trade as well as yourself understood "Hunyadi" to represent one of various aperient waters coming from the neighborhood of Buda Pest, Hungary. Has there been any change in this since the summer of 1896?

A. I don't know that there has been.

229 X Q. Do you mean that this term includes all bitter waters coming from the neighborhood of Buda Pest, whether they bear the name "Hunyadi" on the label or not?

A. I don't know as I can answer for the trade at the present time, by reason of the cloud that has been raised through the mass of litigation and the numerous intimidating circulars sent out by Saxlehner which, so far as I know, have greatly confused the trade.

230 X Q. Have they confused you?

A. Not exactly.

231 X Q. Is it not a fact that the trade will call a water

212 by the name which appears on the label, and will call it "Hunyadi" as long as the name "Hunyadi" appears on the label?

A. I think your question is entirely too broad, I can't give any answer yes or no to it.

232 X Q. Why can't you?

A. Because so many other questions enter into it.

234 X Q. Do you call a bitter water "Hunyadi" which does not bear the name "Hunyadi" on the label?

A. To make my answer distinct, I will be specific and say that, so far as "Apenta" is concerned, we have specially directed the trade not to describe it as "Hunyadi;" whether the trade would have described it as "Hunyadi" under other circumstances, I cannot momentarily say.

235 X Q. Why can't you say?

A. I think that any answer to that question would be a mere guess. We have advertised "Apenta" as "Apenta" so extensively throughout the United States, that naturally every one calls it by that name.

236 X Q. Now, please answer my question once more, more directly. Do you call any bitter water "Hunyadi" if you do not find the name "Hunyadi" on the label?

A. I should be glad to answer if you would give me a concrete case.

237 X Q. Yes. I will give you the case of the "Royal Hungarian bitter water" of Mattoni & Wille, of which I showed you a bottle an hour ago. If you see that bottle in the drug store, do you call it a bottle of "Hunyadi"?

A. As a matter of fact, that is not a concrete case, so far as my experience goes, as I have not seen that bottle on sale for a good many years.

238 X Q. Now, here is a concrete case. I will show you this bottle. Do you call this bottle of "Royal Hungarian bitter water" a bottle of "Hunyadi" water?

A. This bottle, with a label showing that it comes from Buda Pest, would, at least up to the latter part of 1896—that is, prior to the Hungarian minister's decision—have been regarded by
213 me as one of the class of "Hunyadi" waters; and whether it is so to be regarded now is a matter for the court and not for me to say.

239 X Q. But you don't know, as a matter of fact, whether this ever was called "Hunyadi" water in the market here?

A. I believe that that very same water was imported by Eisner & Mendelson for a long period of years under the name "Hunyadi Matyas."

240 X Q. Don't you know, as a matter of fact, that this water was imported and sold by the Eisner & Mendelson Co. as "Royal Hungarian bitter water" for about a year, and its sale proving unsatisfactory, the label was changed to a blue and red color, and the name "Hunyadi Matyas" put upon it?

Defendant's counsel again protests against the trial of other issues than the issue made by the pleadings, and that it is manifestly unfair to consume the time of the court and counsel with other issues; and also counsel further objects to the testimony as incompetent and hearsay.

A. I can't speak knowingly of why Eisner & Mendelson, or the principals, made any change in the appearance of the labels; b it may be that they imported it for a time with the white side panel and afterwards changed the labels so that it would have blue si panels.

241 X Q. Was not the first importation of "Hunyadi Matyas water which was made into this country, made under a red a white label?

A. It may have been, I don't recollect at the moment.

242 X Q. Don't you recollect the label which Andres used?

A. I think the label had those characteristics of color that cou sel describes, but I wouldn't like to answer positively witho reference to records.

243 X Q. Don't you know as a matter of fact that this s
214 called "Hunyadi Matyas" water does not come from t "Hunyadi Matyas" spring, but from a spring called "S Stefan"?

A. I don't know anything about it, from my own knowledge.

Redirect by Mr. RAEGENER:

244 Q. Do you know where the springs are located from whic the "Hunyadi Janos" water emanates?

A. I think that they are practically in Buda Pesth, or just outsi of it.

245 Q. Do you know how many springs are controlled by Sa lehner, and the water of which is mixed together and a compou product drawn therefrom called "Hunyadi Janos"?

A. I know through the testimony that is on record in the vario litigations, that the "Hunyadi Janos" water is drawn from a lar number of wells, larger than the number that were employed at t time the "Hunyadi Janos" business was begun; and also that Sa lehner purchased, according to his own statement in his publishe advertisement, which I can produce at a suitable time, the "Hu yadi Arpad" and the "Hunyadi Bela" springs in 1893.

Complainant's counsel objects to the answer for the reason th the witness apparently with purpose confuses matters of the pu chase of other springs with those from which the "Hunyadi Janos water is drawn, although the question distinctly referred only to t latter, and objects to the answer further as being hearsay evidenc

246 Q. Do you know how far the furthest of these "Hunya Janos" wells is situated away from the original "Hunyadi Janos well opened by Saxlehner?

A. I couldn't say knowingly.

247 Q. What sources of information have you on that subject?

Objected to as incompetent.

215 A. I haven't paid any particular attention to the distan of one well from the other.

248 Q. Do you know where or how that information is obtainable?
A. I should think in Hungary.
249 Q. In your testimony you have said in answer to one of my questions that Frederick De Bary & Co. were agents for Andreas Saxlehner. You meant they were agents for the Apollinaris Co., and that the Apollinaris Co. were agents for Frederick De Bary & Co.?
A. I had no intention of saying that Frederick De Bary & Co. were the agents or consignees of Saxlehner. Quite on the contrary, they were the selling agents of the Apollinaris Co., who were not the agents of Saxlehner, but doing business independently under a contract giving them sole sale or control for certain parts of the world.
250 Q. And the Apollinaris Co. purchased its goods?
A. The Apollinaris Co. purchased its goods outright and did with them as they pleased.
251 Q. Now, I call your attention to page 42 of the record, cross-question 79, and ask you whether that answer is correct, and if not, what explanation you have to offer?
A. The answer, if correctly reported, is not as distinct as I certainty intended it to be. The "Apenta" water at no time bore "Uj Hunyadi" labels, but labels bearing most prominently the name, and only the name, "Apenta," with the descriptive matter that the water was bottled at the "Uj Hunyadi" springs. And the withdrawal of that reference to the "Uj Hunyadi" springs was entirely voluntary on the part of the Apollinaris Co. and its agents in this country, it having been done prior to the decision in the English case before Justice Kekewich, and moreover the conditions in England were different from those in the United States.

Recross by Mr. KNAUTH:

252 X Q. But this withdrawal took place after the decision
216 of the Hungarian minister of commerce forbidding the further use of the name "Uj Hunyadi," did it not?
A. It certainly took place, as I understand it, after the decision in the latter part of 1896 of the Hungarian minister, but also as I understand, because the opportunity or right of appeal was difficult under the Hungarian procedure.
253 X Q. So the Apollinaris regarded that as final?

Objected to by defendant's counsel, it being utterly immaterial what the Apollinaris Co. regarded as final, and it is plainly apparent that this witness, the agent of an agent, cannot say what the Apollinaris Co. thought or considered final.

A. I am not aware that they considered the Hungarian decision as final, and see no reason from my study of the situation why they should have considered it final, as bearing on the United States, where such a question comes up for the judgment of a court and not of a department of *of* the government.
254 X Q. Did you mean to testify or suggest to that the "Hun-

yadi Janos" water was also drawn from the "Hunyadi Bela" and "Hunyadi Arpad" springs?

A. I meant the answer which counsel refers to to be entirely colorless as to the "Hunyadi Arpad" and "Hunyadi Bela" springs.

255 X Q. No, that does not satisfy me. I wish you would answer more positively whether or not the "Hunyadi Janos" water, so far as you know, has only been drawn from the "Hunyadi Janos" springs?

A. There was no intention to intimate that, as a matter of fact, "Hunyadi Janos" is bottled from the "Hunyadi Arpad" or "Hunyadi Bela" springs, as I do not know anything on this point of my own knowledge.

Adjourned subject to notice.

217 It is hereby stipulated and agreed that defendant's time to take testimony be extended to and including the 7th day of December, 1897.

SAXLEHNER
vs.
NIELSEN.

DECEMBER 6, 1897.

Met pursuant to notice.
Present: Counsel as before.

THEODORE W. EDWARDS, a witness called on behalf of defendant, being duly sworn, testifies.

By Mr. RAEGENER:

1 Q. What is your name, age, residence and occupation?

A. Theodore W. Edwards; residence, Jersey City; age, 58. I am buyer for Schieffelin & Co.

2 Q. Schieffelin & Co. of 170 William street, New York city?

A. Yes, sir.

3 Q. How long have you been in the employ of Schieffelin & Co.?

A. For the past forty years.

4 Q. For how many years have you been familiar with various aperient waters sold in the New York market?

A. Ten or twelve years.

5 Q. What has the word "Hunyadi" come to mean during the last ten years, if you know?

Objected to as leading.
(Question withdrawn.)

6 Q. What has the word "Hunyadi" been understood to mean by the public during the last ten years?

Objected to as incompetent.

A. An imported aperient water that came from the vicinity of Buda Pesth.

7 Q. With how many different Hunyadi waters have you been familiar during the last ten years?
A. Oh, half a dozen.
8 Q. Please name them.
A. Lajos, Arpad, Janos, Matyas, Laszlo, Bela.
218 9 Q. What is the business of Schieffelin & Co.?
A. Dealers in drugs, chemicals, and supplies used by druggists.
10 Q. Also in mineral waters?
A. In mineral water also; yes, sir.

Cross-examined by Mr. KNAUTH:

11 X Q. How long have you been acquainted, if at all, with the "Hunyadi Janos" water?
A. Well, about ten years, I should judge, maybe longer, I can't say.
12 X Q. Can you say how long the firm of Schieffelin & Co. has been handling or dealing in such "Hunyadi Janos" water?
A. Well, ever since it was first brought here into this country, but I can't tell you just how long ago that was.
13 X Q. You mean that your recollection of it does not go back further than about ten years?
A. That is my recollection at present.
14 X Q. Then, according to what you have testified, your recollection of "Hunyadi Janos" goes back about as far as your recollection of other waters which you have named?
A. I remember "Hunyadi," if anything, longer than other waters; to the best of my recollection "Hunyadi Janos" was the first one that we handled.
15 X Q. Do you mean to say that all the bitter waters coming from the vicinity of Buda Pesth, and which have been imported into this country for the last ten years, have been known to you as "Hunyadi"?
A. Not all of them.
16 X Q. There have been some others?
A. Some called "Hungarian bitter water."
17 X Q. And those others you would not call "Hunyadi" and have not called "Hunyadi"?
A. We merely sold them as Hungarian bitter water.
18 X Q. Do you know how those other waters were called by the public?
A. I do not.
19 X Q. How do you know that the public called these which you have named "Hunyadi" waters?
A. I only judge from our own customers calling it, they
219 would say "Hunyadi Janos," "Hunyadi Laszlo," or "Matyas," whatever they wanted, designating them.
20 X Q. You mean that customers have come to you and demanded "Hunyadi Laszlo," "Hunyadi Lajos" or "Hunyadi Matyas," and so forth?

A. Yes, sir.

21 X Q. And that inasmuch as all these names involved the name "Hunyadi," you called these "Hunyadi" waters?

A. We called them "Hunyadies," yes, sir.

22 X Q. Were these "Hunyadi" waters distinguished from the other Hungarian bitter waters in anything particular except the name?

A. I don't think of anything except the name.

23 X Q. You called them "Hunyadi" only because you found the name "Hunyadi" on the label in connection with some other description?

A. That is it.

24 X Q. Do you not always call a bitter water by the name which you find on the label?

A. We always do, yes, sir.

25 X Q. And you give no attention to what the bitter water is, or what the name suggests otherwise?

A. I don't exactly understand that question.

26 X Q. I mean you simply go by the name which it bears on the label?

A. Yes, that is the way we do it.

27 X Q. Do you call the "Apenta" water a "Hunyadi" water?

A. No, sir, we do not, we call it "Apenta" water.

28 X Q. You would not consider that as correctly styled by calling it a "Hunyadi" water?

A. No, sir.

29 X Q. Do you call the Hungaria water a "Hunyadi" water?

A. No, sir.

30 X Q. How do you call that?

A. Hungaria bitter water, that is on the label.

31 X Q. Do you call the "Franz Josef" water a "Hunyadi" water?

A. No, sir.

32 X Q. How do you call that?

220 A. That has always come "Franz Josef" water, and we sell it as that.

33 X Q. That water has never been demanded under the name "Hunyadi" water?

A. No.

34 X Q. You would not consider it a correct description of that water to call it "Hunyadi" water?

A. No.

35 X Q. Doesn't the "Franz Josef" water also come from the vicinity of Buda Pesth?

A. I believe it does.

36 X Q. And the "Hungaria" water also?

A. So I understand.

37 X Q. Do you know whether or not these various other "Hunyadi" waters that you have referred to came in under labels which were very similar to Saxlehner's label for the "Hunyadi Janos" water?

A. A number of them did, yes.

38 X Q. Is it not a fact that most of them did?

A. I think that most of them did, as near as I can remember.

39 X Q. If a customer comes to you and demands a bottle of "genuine Hunyadi," with what do you furnish him?

A. "Hunyadi Janos."

40 X Q. What is your usual practice if a customer comes in and simply asks for a case of "Hunyadi"?

A. We invariably give them "Hunyadi Janos."

41 X Q. And you give him another of the Hunyadi waters named by you only when they are specifically called for?

A. Yes, sir.

42 X Q. And that has been the practice of your house?

A. Been the rule of our house.

43 X Q. Is your house a wholesale house, or do they also deal at retail?

A. Wholesale exclusively.

44 X Q. You sell to druggists and retail dealers, I suppose?

A. Yes, sir.

45 X Q. And those dealers usually know what they want?

A. Well, we presume they do.

221 46 X Q. Is it not a fact that these other Hunyadi waters have all been sold at prices lower than the "Hunyadi Janos"?

A. Yes, sir.

47 X Q. Does your firm make a larger profit out of the sale of other Hunyadi waters than the "Hunyadi Janos"?

A. I think not.

48 X Q. Do you know how these other Hunyadi waters are again sold to the public, I mean at what price?

A. At retail, do you mean?

49 X Q. Yes.

A. I do not.

(Signature waived.)

Defendant rests.

222 APPENDIX.

DEFENDANT'S EXHIBIT HALDENSTEIN TABLE.

Importation into the United States of the following waters:

Name.	1886.	1887.	1888.	1889.	1890.	1891.	1892.	1893.	1894.	1895.	1896.	Tota
Hunyadi Arpad	201	.....	1,000	7,649	7,979	3,752	4,438	2,882	Jan. 1	to April 30.		27,90
" Corvin	.....	.....	.....	.....	20	.....	.....	.....	.....	.....	.....	2
" Matyas	.....	.....	.....	.....	2,590	4,662	4,531	1,954	6,210	5,185	520	25,65
" Laszlo	.....	.....	.....	.....	200	.....	397	264	936	268	.....	2,06
" Bela	.....	.....	.....	.....	.....	397	265	284	.....	.....	.....	94
" Jozsef	.....	.....	.....	.....	.....	132	.....	.....	144	.....	.....	27
" Lajos	.....	.....	.....	.....	.....	.....	667	2,265	2,772	5,148	528	11,38
" Miklos	.....	.....	.....	.....	.....	.....	.....	.....	.....	132	.....	13
" Vilmos	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	263	26

The figures given represent cases each containing fifty (50) bottles.

223 DEFENDANT'S EXHIBIT GRAEF CIRCULAR.

"Hunyadi" waters.

Paragraphs have recently appeared in some newspapers here stating that a New York firm of mineral-water dealers are the lessees in America of the Hunyadi waters of Buda Pesth, and respectively sole agents in the United States for the famous Hunyadi springs of Hungary.

These statements are absolutely false, and the intention with which they are made are obvious.

Before any Hunyadi water was practically known in the United States, the Apollinaris Company, Limited, of London, widely and successfully introduced the Hunyadi Janos water, the proprietor in Buda Pesth of the springs having entrusted to them, for a term of years still unexpired, the sole sale of this water in England and in all transmarine places. Hunyadi Janos water having become very popular quite a number of other waters are now offered for sale, under names, of which the word Hunyadi forms part, and in bottles, and with labels, closely resembling in appearance and color those long used for Hunyadi Janos water.

The word "Hunyadi" having become a generic name for Hungarian bitter waters, good, bad or indifferent, the Apollinaris Company affixed to the bottles of Hunyadi Janos the Hungarian bitter water of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Company, Limited.

224 Consumers, who desire to secure the Hungarian bitter water sold by the Apollinaris Company, are requested to see that the bottle bears the red diamond and the are cautioned against such absolutely false statements as those contradicted herein.

CHARLES GRAEF & CO.,
32 *Beaver Street, New York,*
Sole Agents in the United States and Canada of the Apollinaris Company, Limited, London.

225 United States Circuit Court for the Eastern District of New York.

EMILIE SAXLEHNER
v.
ALEXANDER NIELSEN.

SHIPMAN, *C. J.:*

This is a bill in equity by a resident of Budapest in Hungary and a subject of the King of Hungary, against a citizen of Brooklyn and the State of New York, to enjoin him from the sale of Hungarian bitter water under the name of "Hunyadi Lajos," and in bottles bearing labels which imitate those used by the complainant in her

business of selling in this country a Hungarian bitter water called Hunyadi Janos.

A similar action by the complainant against the Eisner & Mendelson Company to restrain that company from the use of the name Hunyadi Matyas, has recently been tried before me in the United States circuit court for the southern district of New York, upon a full record, and the facts in regard to the history of the name Hunyadi in connection with the sale of Hungarian bitter waters, and to the history of such sales in this country, and to the exclusive right of the complainant to the name, and the conclusions of the court are stated at length in the opinion which has just been filed and need not be formally repeated. The record in this case is much shorter and gives the Hunyadi history in a somewhat disjointed way, but the conclusion that the complainant had no exclusive right in this country after the year 1888 to the name Hunyadi is unaltered.

226 The history of the complainant's red and blue label, which has been used in this country upon the bottles of her Hunyadi Janos water, was also stated in the Eisner & Mendelson case. The firm of Bell, Pollitz & Co., of which Nielson was a member, began to import Hungarian bitter water into this country in 1892, under the name of Hunyadi Lajos, and to sell it in bottles with labels closely resembling the red and blue labels of the complainant. The water was called by that name in Hungary and the importers used the label because it was associated in the minds of the public with the character and reputation of the Janos water, and because its use greatly facilitated the sale of any Hunyadi water and created for the Lajos water a market without trouble or expense. The use of this simulated label was intentional and was fraudulent in its object and in its results. It does not appear in the record when the partnership of Bell, Pollitz & Co. was dissolved and when Nielson took the business upon himself, but he continued the use of the label upon the bottles which he sold until after the commencement of this suit, when he changed the label. He was notified of the alleged infringement in October, 1896. The complainant is not chargeable with laches in not taking earlier measures to suppress the defendant's use of the label.

There can be no decree against the use of the name Hunyadi. Let there be an interlocutory decree for an injunction against the infringement of the complainant's red and blue label, and an accounting of the damages to the complainant arising from the infringements since the defendant's sole ownership of the business. The question of costs will be reserved until final decree.

(Endorsed:) Opinion. Filed June 30, 1898.

227 At a stated term of the circuit court of the United States of America in and for the eastern district of New York, held at the city of Brooklyn, in the State of New York, on the 11th day of May, 1898.

Present: Hon. Nathaniel Shipman, circuit judge.

EMILIE SAXLEHNER, Complainant,
vs.
ALEXANDER NIELSEN, Defendant.

This cause having come on to be heard on the bill of complaint herein, the answer of the defendant, the replication of the complainant herein, and the proofs, oral, documentary and written, taken and filed in said cause, and after having been argued by counsel for the respective parties and submitted to the consideration of the court upon their respective briefs:

Now, therefore, upon consideration thereof, and on motion of Briesen & Knauth, complainant's solicitors, for a decree, it is

Ordered, adjudged and decreed, and the court does hereby order, adjudge and decree as follows, to wit:

1. That previous to the commencement of this suit the defendant herein has infringed upon the exclusive rights of the complainant to the red and blue labels used on her "Hunyadi Janos" bitter water by wrongfully and fraudulently selling and offering for
228 sale in the eastern district of New York and elsewhere in the United States bitter water in bottles like those used by complainant for her said Hunyadi Janos bitter water, the same being of a straight shape with a short neck, bearing labels in color, size, shape and general design so closely similar to complainant's said labels as to be calculated to deceive, the said labels being divided into three panels, the central panel being of a reddish brown and bearing a portrait in a medallion, and the side panels being blue, said labels bearing the inscription "Hunyady Lajos."

2. That an injunction issue herein perpetually restraining and enjoining the defendant Alexander Nielsen, his servants, agents and all persons in privity with him or them from selling or offering for sale any bitter water not coming from the Hunyadi Janos wells of the complainant in bottles bearing labels like those above described, and from selling or offering for sale any such bitter water under labels imitating complainant's Hunyadi Janos labels in size, color, shape and general arrangement so closely as to be calculated to deceive the public into the belief that they are complainant's labels.

3. That the complainant recover from the defendant the damages which she has sustained by reason of the sale by defendant of bitter water bearing the red and blue labels described in the first paragraph of this decree, and that it be referred to Charles H. Otis, Esq., of Brooklyn, New York, who is hereby appointed special master for the purpose of this suit to ascertain and take and state and report to the court an account of all the gains, profits and advantages which the said defendant has received or which have arisen or accrued to said defendant since the defendant's sole ownership of the

business from the use of said simulated labels upon the bitter water sold by him, and to ascertain and state the damages suffered by complainant by reason of such unlawful sale and offering for sale.

229 4. And it is further ordered, adjudged and decreed that the complainant on such accounting have the right to cause the examination of the defendant, his agents, servants and workmen, and such other witnesses as may be necessary to take said accounting, and also have the right on such accounting to the production of the books, vouchers, documents and other papers of which said defendant, his servants, agents or workmen, may be possessed before said master from time to time as such master may direct.

5. It is not intended by this decree to restrain the defendant from using the name "Hunyady" or "Hunyadi" as a prefix to some other name than "Janos," or to sell or advertise for sale bitter water not coming from the wells of the complainant as "Hunyadi" water, and the injunction demanded by complainant against such use of the name "Hunyadi" or "Hunyady" alone, or as a prefix to some other name than "Janos" is hereby refused.

6. That the question of costs be and it is hereby reserved until the entry of a final decree in this case.

N. SHIPMAN,
Circuit Judge.

Endorsed: Interlocutory decree. Filed and entered July 18, 1898.

230 Circuit Court of the United States for the Eastern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
ALEXANDER NIELSEN, Defendant and Appellee. } In Equity.

To the honorable the United States circuit court of appeals for the second circuit:

The appeal of the above-named complainant and appellant respectfully showeth:

That upon the 6th day of January, 1897, the above-named complainant filed her bill of complaint in the circuit court of the United States for the eastern district of New York against the above-named defendant and appellee, Alexander Nielsen, in a suit in equity, alleging that said defendant had infringed the rights of the complainant to the exclusive use of the name "Hunyadi" as applied to bitter water, and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water, and praying for an accounting and payment to the complainant by the said defendants of the profits by him realized and of the damages suffered by said complainant and appellant by reason of said infringement of the exclusive rights as above set forth, and also that the writs of subpœna and of injunction might be issued against said defendant, his servants, agents, attorneys and workmen.

This complainant and appellant further shows that pursuant to said prayer a subpœna *ad respondendum* issued out of and
231 under the seal of the circuit court, and was duly served upon the said defendant Alexander Nielsen.

This complainant and appellant further shows that thereafter the said defendant Alexander Neilsen appeared and answered said bill of complaint by filing his answer thereto, and amongst other things therein denied that the complainant had the exclusive right to the name "Hunyadi" as applied to bitter water and to the style of bottling and labeling used by her for her "Hunyadi Janos" bitter water and denied that he infringed the rights of the complainant. A general replication was filed thereto and issue being thus joined testimony was taken and such proceedings were had that on the 18th day of July, 1898, an interlocutory decree was entered in said circuit court, wherein it was in substance adjudged and decreed that the said Alexander Nielsen had infringed upon the rights of the complainant to the red and blue labels used on her "Hunyadi Janos" bitter water, by using certain labels described in said interlocutory decree, being the "Hunyady Lajos" labels, but in which interlocutory decree it was adjudged and decreed that the said decree was not intended to restrain the defendant from using the name "Hunyadi" or "Hunyady" as a prefix to some other name than "Janos," or to sell or advertise for sale bitter water not coming from the wells of the complainant as "Hunyadi" water and which decree refuses the injunction demanded by the complainant against the use of the name "Hunyadi" or "Hunyady" alone, or as a prefix to some other name than "Janos," which said interlocutory decree is in these respects, as the complainant and appellant is advised, erroneous, and ought to be reversed.

Wherefore, this appellant appeals from the said interlocutory decree of said circuit court of the United States, in so far as it adjudges and decrees that it is not intended by said decree to restrain the defendant from using the name "Hunyady" or "Hun-
232 yadi" as a prefix to some other name than "Janos," or to sell or advertise for sale bitter water not coming from the wells of the complainant as "Hunyadi" water, and which refuses the injunction demanded by the complainant against such use of the name "Hunyadi" or "Hunyady" alone or as a prefix to some other name than "Janos;" and which adjudges and decrees that the question of costs be reserved until the entry of a final decree; and which refuses an accounting for the use of the word "Hunyady" or "Hunyadi" by the defendant on *its* bitter water, to the United States circuit court of appeals for the second circuit, and respectfully prays that the decree of said circuit court, together with the bill of complaint, answer, replication, pleadings, depositions, evidence, exhibits and proceedings in said cause may be sent to the United States circuit court of appeals for the second circuit without delay, and that the said United States circuit court of appeals for the second circuit will proceed to hear said cause anew, and that the said decree of the said circuit court in so far as is hereinabove set forth may be reversed, with costs, and that the complainant may

be given the relief prayed for in her bill of complaint or such other decree made as the United States circuit court of appeals for the second circuit shall deem just.

A. v. BRIESEN, *Of Counsel.*

Appeal allowed August 10, 1898.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Appeal. Filed August 11, 1898.

233 Circuit Court of the United States for the Eastern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
ALEXANDER NIELSEN, Defendant and Appellee. } In Equity.

In pursuance of and obedient to rule 11, formulated and adopted by the United States circuit court of appeals, for the second circuit, the above-named complainant respectfully makes the following assignment of errors in the above entitled case, to wit:

1. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the Hunyadi Janos wells of the complainant.

2. That the court erred in refusing to grant an injunction against the defendant enjoining it from the use of the name "Hunyadi" upon bitter water not coming from the complainant.

3. That the court erred in refusing an injunction enjoining the defendant from the use of the name Hunyady Lajos upon such bitter water.

4. That the court erred in refusing an account of the profits and damages as prayed for in the bill of complaint.

234 5. That the court erred in holding that the trade-mark or name Hunyadi of the complainant had been abandoned.

6. That the court erred in holding that the trade-mark or name Hunyadi of the complainant had been abandoned by her, or by any person or party acting for, or representing or authorized to act for or represent her, or her predecessor in interest, Andreas Saxlehner.

7. That the court erred in refusing to restrain the defendant from using the name "Hunyady" or "Hunyadi" as a prefix to some other name than "Janos," or to sell or advertise for sale bitter water not coming from the wells of the complainant as "Hunyadi" water, and in refusing the injunction demanded by complainant against such use of the name "Hunyadi" or "Hunyady" alone, or as a prefix to some other name than "Janos."

8. That the court erred in not granting the complainant the costs of the suit.

9. That the court erred in so far as it failed and refused to grant

to the complainant the relief demanded by the bill and each and every part thereof.

BRIESEN & KNAUTH,
Solicitors for Complainant and Appellant.

(Endorsed:) Assigment of errors. Filed August 11, 1898.

235 Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
ALEXANDER NIELSEN, Defendant and Appellee.
} Bond for Damages and Costs.

Know all men by these presents, that we, Percival Kuhne, residing at No. 22 West Fifty-sixth street, in the city of New York, borough of Manhattan, N. Y., and Max Hessberg, residing at No. 69 East Eighty-second street, in the city of New York, borough of Manhattan, N. Y., are held and firmly bound unto the above-named Alexander Nielsen, in the sum of two hundred and fifty $\frac{00}{100}$ ($250) dollars, to be paid to the said Alexander Nielsen, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, the above-named Emilie Saxlehner has prosecuted an appeal to the United States circuit court of appeals, for the second circuit, to reverse the decree rendered in the above-entitled suit, by the judge of the circuit court of the United States, for the southern district of New York:

Now, therefore, the condition of this obligation is such, that
236 if the above-named Emilie Saxlehner shall prosecute her appeal to effect and answer all damages and costs, if she shall fail to make her said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

PERCIVAL KUHNE. [L. S.]
MAX HESSBERG. [L. S.]

Sealed and delivered, and taken and acknowledged this 10th day of August, 1898, before me—

[SEAL.]
OTTO v. SCHRENK,
Notary Public, New York County.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

Percival Kuhne and Max Hessberg, being severally duly sworn, do depose and say: That they severally are residents and householders of the city of New York, and that they are severally worth

the sum of five hundred ($500) dollars, over and above all his just debts and liabilities.

PERCIVAL KUHNE.
MAX HESSBERG.

Sworn to this 10th day of August, A. D. 1898, before me—
OTTO v. SCHRENK,
Notary Public, N. Y. County.

[SEAL.]

(Endorsed:) U. S. circuit court, southern district of New York. Emilie Saxlehner, complainant and appellant, *vs.* Alexander Nielsen, defendant and appellee. Bond for damages and costs on appeal. Briesen & Knauth, solicitors for complainant and appellant, 229 Broadway, New York, N. Y. Approved as to form and sufficiency of surities, N. Y., August 10th, 1898. E. H. Lacombe, U. S. circuit judge. Filed August 11th, 1898.

237 Circuit Court of the United States for the Eastern District of New York.

EMILIE SAXLEHNER, Complainant and Appellee,
vs.
ALEXANDER NIELSEN, Defendant and Appellant.
} In Equity.

Petition on Appeal.

To the honorable the judges of the circuit court of appeals for the second circuit:

The appeal of the above-named defendant respectfully shows:

The above-named defendant, Alexander Nielsen, conceiving himself aggrieved by the interlocutory decree made and entered in the above-entitled cause and filed in the office of the clerk of this court on the 18th day of July, 1898, does hereby appeal therefrom to the United States circuit court of appeals for the second circuit, and he prays that his appeal may be allowed and a citation may be directed to the above-named complainant, commanding her to appear before the United States circuit court of appeals for the second circuit, to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings and evidence in said cause, duly authenticated, may be sent to the United States circuit court of appeals for the second circuit, and that said
238 decree of the circuit court herein may be reversed, and such decree made as to the said circuit court of appeals may seem meet and just.

EDWARD KAUFMANN,
Solicitor for Defendant.
LOUIS C. RAEGENER,
Of Counsel.

The foregoing appeal is allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) Petition on appeal. Filed August 16, 1898.

Circuit Court of the United States for the Eastern District of New York.

EMILIE SAXLEHNER, Complainant and Appellee,
vs.
ALEXANDER NIELSEN, Defendant and Appellant.
} In Equity.

Assignment of Errors.

And now comes the defendant and says, that the interlocutory decree made and entered herein in the office of the clerk of the United States circuit court for the eastern district of New York, on the 18th day of July, 1898, is manifestly erroneous and against the just rights of the defendant, for the following reasons, namely:

First. The court erred in holding that previous to the commencement of this suit the defendant herein has infringed upon the
239 exclusive rights of the complainant to the red and blue labels used on her "Hunyadi Janos" bitter water by wrongfully and fraudulently selling and offering for sale in the eastern district of New York and elsewhere in the United States bitter water in bottles like those used by complainant for her said Hunyadi Janos bitter water, the same being a straight shape with a short neck, bearing labels in color, size, shape and general design so closely similar to complainant's said labels as to be calculated to deceive, the said label being divided into three panels, the central panel being of a reddish brown and bearing a portrait in a medallion, the side panels being blue, said labels bearing the inscription "Hunyady Lajos."

Second. The court erred in holding that the defendant has infringed upon any exclusive rights of the complainant whatsoever.

Third. The court erred in holding that the defendant wrongfully and fraudulently sold and offered for sale in the eastern district of New York and elsewhere in the United States bitter water in bottles like those used by complainant for her Hunyadi Janos bitter water.

Fourth. The court erred in holding that the defendant was or had been guilty of any wrongful or fraudulent conduct toward the complainant.

Fifth. The court erred in granting the injunction herein against this defendant, enjoining and restraining said defendant as set forth in the second section of the decree herein.

Sixth. The court erred in perpetually enjoining and restraining this defendant from selling or offering for sale any bitter water not coming from the Hunyadi Janos wells of the complainant in bottles bearing labels divided into three panels, the central panel being of a reddish brown and bearing a portrait in a medallion, and
240 the side panels being blue, said labels bearing the inscription "Hunyadi Lajos."

Seventh. The court erred in granting any injunction herein against this defendant.

Eighth. The court erred in holding that the complainant was entitled to recover any damages from the defendant by reason of the sale by defendant of bitter water bearing the red and blue labels described in the first paragraph or section of the decree herein.

Ninth. The court erred in holding that the complainant was entitled to recover any damages whatever from the defendant herein.

Tenth. The court erred in granting the reference and accounting granted by the decree herein.

Eleventh. The court erred in granting any accounting herein.

Twelfth. The court erred in not holding that the complainant, by reason of her abandonment, laches, acquiescence and estoppel, was disentitled to an injunction against the defendant herein.

Thirteenth. The court erred in not holding that the complainant, by reason of her laches and acquiescence, was disentitled to any accounting or damages herein.

Fourteenth. The court erred in not dismissing the bill of complaint herein.

ALEXANDER NIELSEN,
By EDWARD KAUFMANN,
His Solicitor.

LOUIS C. RAEGENER, *Of Counsel.*

(Endorsed:) Assignment of errors. Filed August 16, 1898.

241 Circuit Court of the United States for the Eastern District of New York.

EMILIE SAXLEHNER, Complainant,
vs.
ALEXANDER NIELSEN, Defendant. } In Equity.

Know all men by these presents: that we, Julius de Neergaard, of 225 Fifth avenue, in the borough of Brooklyn, of the city of New York, and John Kolbe, of 263–7 Prospect avenue, in said borough of Brooklyn, of the city of New York, are held and firmly bound unto the above-named Emilie Saxlehner in the sum of two hundred and fifty dollars ($250), to be paid to the said Emilie Saxlehner, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 12th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas, the above-named Alexander Nielsen has prosecuted an appeal to the United States circuit court of appeals for the second circuit to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the eastern district of New York;

Now, therefore, the condition of this obligation is such that if the said Alexander Nielsen shall prosecute his said appeal to effect and

answer all damages and costs if he shall fail to make his appeal
242 good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JULIUS DE NEERGAARD. [L. S.]
JOHN KOLBE. [L. S.]

UNITED STATES OF AMERICA, } ss:
Eastern District of New York, County of Kings, }

Julius de Neergaard, being duly sworn, deposes and says: That he is a resident and freeholder within the said county of Kings of the State of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, and over and above all property exempt from sale on execution.

JULIUS DE NEERGAARD.

Sworn to before me this 12th day of August, 1898.

THORLIEF NIELSEN,
[L. S.] *Notary Public* (12), *N. Y. Co.*

Certif. filed in Kings Co.

UNITED STATES OF AMERICA, } ss:
Eastern District of New York, County of Kings, }

John Kolbe, being duly sworn, deposes and says: That he is a resident and freeholder within the said county of Kings of the State of New York, and that he is worth the sum of five hundred dollars over and above all his just debts and liabilities, and over and above all property exempt from sale on execution.

JOHN KOLBE.

Sworn to before me this 12th day of August, 1898.

THORLIEF NIELSEN,
[L. S.] *Notary Public* (12), *N. Y. Co.*

Certif. filed in Kings Co.

243 UNITED STATES OF AMERICA, } ss:
Eastern District of New York, County of Kings, }

On this 12th day of August, 1898, before me personally appeared Julius de Neergaard, to me known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same for the purposes therein mentioned.

THORLIEF NIELSEN,
[L. S.] *Notary Public* (12), *N. Y. Co.*

Certif. filed in Kings Co.

UNITED STATES OF AMERICA, } ss:
Eastern District of New York, County of Kings, }

On this 12th day of August, 1898, before me personally appeared John Kolbe, to me known and known to me to be the person described in and who executed the foregoing instrument, and acknowledged to me that he executed the same for the purposes therein mentioned.

THORLIEF NIELSEN,
Notary Public (12), *N. Y. Co.*

[L. S.]

Certif. filed in Kings Co.

(Endorsed:) U. S. circuit court, eastern dist. of New York. In equity. Emilie Saxlehner *vs.* Alexander Nielsen. Copy bond on appeal. Filed August 16, 1898. Edward Kaufmann, def't's solicitor, 280 Broadway, New York. Approved: E. Henry Lacombe, U. S. circuit judge. Due service of the within bond on appeal and notice of filing is hereby admitted this 16th day of August, 1898. Briesen & Knauth, compl't's sol'rs.

SIRS: Please take notice that the within is a copy of the bond on appeal herein this day filed in the office of the clerk of the United States circuit court for the eastern district of New York. Dated Aug. 16, 1898.

Yours, &c.,
EDWARD KAUFMANN,
Def't's Sol'r.

To Messrs. Briesen & Knauth, compl't's sol'rs.

244 UNITED STATES OF AMERICA, } ss:
Eastern District of New York, }

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, do hereby certify that the foregoing is a true transcript of the pleadings, proofs, opinion, decree and papers on appeal of complainant and defendant, made up pursuant to stipulation hereto annexed, to be transmitted to the United States circuit court of appeals for the second circuit, in the case of Emilie Saxlehner against Alexander Nielsen.

In witness whereof, I have hereunto set my hand and seal of this court this 1st day of September, 1898.

[SEAL.]
B. LINCOLN BENEDICT, *Clerk.*

(Stamp.)

By the Hon. E. Henry Lacombe, circuit judge in and for the circuit court of the United States for the second circuit.

To Alexander Nielson:

Whereas, Emilie Saxlehner has lately appealed to the United States circuit court of appeals for the second circuit from a decree entered in the circuit court of the United States for the eastern district of New York on the 18th day of July, 1898, and has filed the

security required by law: You are therefore hereby cited to appear before the said United States circuit court of appeals for the second circuit, at the city of New York, on the 6th day of September next, to do in the matter of said appeal what remain- to justice to be done in the premises.

Given under my hand, at the city of New York, in the
245 southern district of New York, in the second circuit, the 10th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) 3/440. United States circuit court, eastern district of New York. Emilie Saxlehner, complainant and appellant, *vs.* Alexander Nielsen, defendant and appellee. Citation. Briesen & Knauth, solicitors for compl't and appellant, 229 Broadway, borough of Manhattan, New York. Due service of a copy of the within citation is hereby admitted this 11th day of August, 1898. Edward Kauffman, solicitor for def't. Received August 11, 1898.

By the Honorable E. Henry Lacombe, circuit judge in and for the circuit court of the United States for the second circuit.

To Emilie Saxlehner:

Whereas, Alexander Neilsen has lately appealed to the United States circuit court of appeals for the second circuit from a decree entered in the circuit court of the United States for the eastern district of New York, on the 18th day of July, 1898, and has filed the security required by law; you are therefore hereby cited to be and appear before the said United States circuit court of appeals for the second circuit, at the city of New York, in said circuit, on the 6th day of September next, to do in the matter of said appeal what remains to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 16th day of August, in the year of our Lord one thousand eight hundred and ninety-eight.

E. H. LACOMBE,
United States Circuit Judge.

246 (Endorsed:) 3/440. U. S. circuit court, eastern district of N. Y. In equity. Emilie Saxlehner *vs.* Alexander Nielsen. Citation. Edward Kaufmann, def't's solicitor, 280 Broadway, New York. Due service of the within citation is hereby admitted this 16th day of August, 1898. Briesen & Knauth, compl't's solicitors. Received August 16, 1898.

U. S. Circuit Court, Eastern District of New York.

EMILIE SAXLEHNER, Complainant and Appellant,
vs.
ALEXANDER NIELSEN, Defendant and Appellee. } In Equity.

It is hereby stipulated by and between the solicitors for the respective parties that the foregoing is a true and correct copy of the record and papers on appeal in the above-entitled cases.

Dated August 27, 1898.

BRIESEN & KNAUTH,
Sol'rs for Complainant.
EDWARD KAUFMANN,
Sol'r for Defendant.

247 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Submitted December 7, 1898; decided January 5, 1899.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
ALEXANDER NEILSEN, Defendant, Appellant. } No. 85.

Appeal from the circuit court of the United States for the southern district of New York.

Before Judges Wallace and Lacombe.

Cross-appeals from a decree of the circuit court, southern district of New York.

Per Curiam:

The questions raised in this cause are substantially the same as in Saxlehner *vs.* Eisner & Mendelson, decided herewith. The circuit court held that complainant had no exclusive right in this country to the name "Hunyadi," in which conclusion we concur. The circuit court further granted an injunction against continued use of the red and blue labels, and an accounting for past infringements by the use of such labels. For reasons stated in the Eisner case the decree as to the labels is reversed, and cause remitted with instructions to dismiss the bill, with costs of this appeal.

Antonio Knauth, for the complainant.
Louis C. Raegener, for the defendant.

248 At a stated term of the United States circuit court of appeals in and for the second circuit, held at the court-rooms, in the post-office building, in the city of New York, on the 24th day of January, one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, circuit judges.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
ALEXANDER NIELSEN, Defendant, Appellant.

Appeals from the circuit court of the United States for the eastern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of New York and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the decree of said circuit court be, and it hereby is, reversed as to the red and blue labels and remitted with instructions to dismiss the bill, with costs of this appeal.

It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

W. J. W.
E. H. L.

249 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *vs.* Alexander Nielsen. Order for mandate.

250 United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Petitioner,
vs.
ALEXANDER NIELSEN.
In Equity.

SIRS: Take notice that on Tuesday, January 24, 1899, at the opening of the court on that day, at 10.30 a. m., or as soon thereafter as counsel can be heard, we shall move this court for a rehearing of the above-entitled suit, and that in support of such motion a petition will be presented to this court, a copy of which is herewith served upon you.

January 17, 1899.

Yours, &c.,

JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Att'ys and of Counsel for Petitioner.

To Louis C. Raegener, Esq., of counsel for defendant.

251 United States Circuit Court of Appeals, Second Circuit.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
ALEXANDER NIELSEN, Defendant, Appellant.
} Petition for Rehearing.

To the honorable the judges of the said court:

Your petitioner, Emilie Saxlehner, complainant and appellant, hereby respectfully represents to this court as follows:

First. That she is advised and believes this court has been inadvertently led into error concerning the law which is applicable to this suit, in that it did not regard the importance, upon the questions therein involved, of the treaty or convention between the United States of America and the Austro-Hungarian Empire which was proclaimed on June 1, 1872, and which was in full force and effect at the time this suit was brought. This treaty or convention is in words as follows, to wit:

"Convention between the United States and the Austro-Hungarian Empire, November 25, 1871. Proclaimed June 1, 1872 (17 Statutes at Large, 917.)

"Article I.

"Every reproduction of trade-marks which, in the countries or territories of the one of the contracting parties, are affixed
252 to certain merchandise to prove its origin and quality, is forbidden in the countries or territories of the other of the contracting parties, and shall give to the injured party ground for such action or proceedings to prevent such reproduction, and to recover damages for the same, as may be authorized by the laws of the country in which the counterfeit is proven, just as if the plaintiff were a citizen of that country.

"The exclusive right to use a trade-mark for the benefit of citizens of the United States in the Austro-Hungarian Empire, or of citizens of the Austro-Hungarian monarchy in the territory of the United States, cannot exist for a longer period than that fixed by the law of the country for its own citizens. If the trade-mark has become public property in the country of its origin, it shall be equally free to all in the countries or territories of the other of the two contracting parties.

"Article II.

"If the owners of trade-marks, residing in the countries or territories of the one of the contracting parties, wish to secure their rights in the countries or territories of the other of the contracting parties, they must deposit duplicate copies of those marks in the Patent Office at Washington, and in the chambers of commerce and trade in Vienna and Pesth."

Second. It is in evidence that the petitioner duly registered her trade-mark, "Hunyadi," together with a description of the red and blue label upon which it was used in the United States Patent Office in the year 1887, and that she likewise registered the red and blue label in the chambers of commerce and industry at Budapest in 1890 (under the statute passed in that year), and the name "Hunyadi" in the year 1895 (under the statute of 1895). Being a subject of the King of Hungary and not of the Emperor of Austria
253 she had no occasion, nor does there seem to be any provision for a registration of her trade-mark in Vienna.

Third. It is clearly proven in this suit that prior to the year 1890 your petitioner had no relief in Hungary against persons using colorable imitations of her label, and that until the year 1895 she had no relief there against any persons using the name "Hunyadi" (alone or in connection with other names) for fraudulent purposes on bitter waters. Immediately after the passing of the statute of 1890 she commenced suits in Hungary against the infringers of her label and brought them to a successful termination in the years 1894 to 1895. Immediately after the passing of the act of 1895, again, she commenced suits in Hungary against the same persons for unlawfully using the name "Hunyadi," and obtained final decrees in her favor in the month of October, 1896. During that same month she gave notice to the infringers of her name and label in the United States, instituted a number of actions against druggists, to collect proof of fraudulent passing off, and a few months later, in the commencement of 1897, brought the present suit.

Fourth. Previous to the termination of those suits in Hungary the treaty above cited was a serious obstacle to her right to sue in the United States. The defendants in those cases might well claim that under the treaty she was not authorized to enforce any trade-mark rights which were not recognized in the country of its origin. Therefore she could not be fairly charged with laches until after the time that her rights were recognized and protected in her own country.

Fifth. After such establishment of her rights in Hungary the treaty above cited clearly provides that every reproduction of petitioner's trade-mark and label is now likewise forbidden in
254 the United States and shall give to petitioner ground for such relief as is usually given in this country in such cases.

Wherefore, your petitioner respectfully asks that no mandate issue from this court under its opinion of January 7, 1899, and that a rehearing be granted and an order entered reversing the decision below and giving applicant the relief prayed for in her bill of complaint in the above-entitled suit.

And your petitioner will ever pray, &c.

EMILIE SAXLEHNER, *Petitioner,*
By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN, AND
ANTONIO KNAUTH,
Her Counsel.

We hereby certify that in our opinion the foregoing petition is well founded in point of law and in point of fact, and is not presented for delay.

JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Counsel for Complainant, Appellant.

Endorsed: Due service of a copy of the within notice of motion and petition is hereby admitted this 17th day of January, 1899. (Signed) Louis C. Raegener, of counsel for def't, appellant.

255 United States Circuit Court of Appeals for the Second Circuit, October Term, 1898.

Nos. 85, 86, 87, 88, and 89.

Motion submitted January 24, 1899; decided January 25, 1899.

EMILIE SAXLEHNER, Complainant, Appellant,
vs.
ALEXANDER NEILSEN, Defendant, Appellant.

SAME, Complainant, Appellant,
vs.
THE EISNER & MENDELSON COMPANY, Defendant, Appellant.

SAME, Complainant, Appellant,
vs.
THE SIEGEL-COOPER COMPANY, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
RUDOLPH GIES, Defendant, Appellee.

SAME, Complainant, Appellant,
vs.
LOUIS MARQUET, Defendant, Appellee.

Appeals from the circuit court of the United States for the eastern and southern districts of New York.

Before Judges Wallace and Lacombe.

Motion for Reargument.

Per Curiam:

We are unable to assent to the proposition that the provisions of the treaty are to be construed so as to hold that when the public in this country has acquired, through the owner's laches, the right to use a trade name and a trade-mark, such right is abrogated, whenever by the operation of some subsequent Hungarian law the trade name and trade-mark is secured to him in Hungary. For that reason petition for reargument is denied.

256 U. S. Circuit Court of Appeals, Second Circuit.

EMILIE SAXLEHNER
vs.
ALEXANDER NIELSEN. } In Equity.

A petition for a rehearing herein having been filed by the complainant, appellant, Emilie Saxlehner, together with a brief in support thereof, and the same having been duly considered, it is hereby—

Ordered that said petition be, and the same hereby is, denied.

W. J. W.

E. H. L.

257 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York,

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 256, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Emilie Saxlehner, complainant, appellant, against Alexander Nielsen, defendant, appellant, as the same remain- of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 11th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-third.

Seal United States Circuit Court of Appeals, Second Circuit.

WM. PARKIN, *Clerk.*

[Te- -cent U. S. internal-revenue stamp, canceled 2, 11, '99.]

257½ [Endorsed:] Case No. 17,301. U. S. C. C. of appeals, 2nd circuit. Term No., 716. Emilie Saxlehner, petitioner, *vs.* Alexander Nielsen. Filed February 17, 1899.

258 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Emilie Saxlehner is appellant and Alexander Nielsen is appellee, on appeal and cross-appeal, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the eastern district of New York, and we being willing for certain reasons that the said cause and the

record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of
259 the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

260 [Endorsed:] Supreme Court of the United States. No. 716. October term, 1898. Emily Saxlehner *vs.* Alexander Nielsen. Writ of certiorari. United States circuit court of appeals, second circuit. Filed Mar. 29, 1899. William Parkin, clerk.

261 United States Circuit Court of Appeals for the Second Circuit.

EMILIE SAXLEHNER, Appellant & Appellee,
vs.
ALEXANDER NIELSEN, Appellee & Appellant.

A writ of certior-i having been issued by the Supreme Court of the United States in the above-entitled cause, directed to the circuit court of appeals for the second circuit, it is stipulated between the solicitors and counsel for the respective parties to said suit that the certified transcript of the record and proceedings therein, heretofore filed in the Supreme Court of the United States with the petition for writ of certiorari in said cause on February 16, 1899, be the return of the clerk of this court to said writ of certiorari.

Dated New York, March 28, 1899.

BRIESEN & KNAUTH,
Solicitors & Counsel for Emilie Saxlehner.
EDWARD KAUFMANN, *Solicitor,*
LOUIS C. RAEGENER, *Of Counsel,*
Solicitors & Counsel for Alexander Nielsen.

262 To the honorable the Supreme Court of the United States:

The record and all proceedings in the cause whereof mention is within made having been lately certified and filed in the office of the clerk of the honorable the Supreme Court of the United States, a certified copy of the stipulation of counsel is hereto annexed, and under the direction of counsel for the appellant said stipulation is certified as a return to this writ.

New York, March 29th, 1899.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

[Ten-cent U. S. internal-revenue stamp, canceled 3, 29. W. P.]

363 [Endorsed:] United States circuit court of appeals, second circuit. Emilie Saxlehner *v.* Alexander Nielsen. Return to writ of certiorari.

264 [Endorsed:] File No., 17,301. Supreme Court U. S., October term, 1898. Term No., 716. Emilie Saxlehner, petitioner, *vs.* Alexander Nielsen. Writ of certiorari & return. Office Supreme Court U. S. Filed Apr. 1, 1899. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED
FEB 17 1899
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 1146 Orig 33.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN.

Notice of Motion, Motion and Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

JOSEPH H. CHOATE,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner.

The Evening Post Job Printing House, New York.

Supreme Court of the United States. 1

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN.

October Term,
1898.

No.

Notice of Motion.

To ALEXANDER NIELSEN, the above named defendant: 2

Please take notice that on Monday, February 20, 1899, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion for a writ of *certiorari*, of which motion a copy is annexed, will be submitted to the Supreme Court of the United States at the City of Washington, D. C., for the decision of the Court thereon.

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition and of the brief are herewith served upon you.

Respectfully,
JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Attorneys and of Counsel for Petitioner. 3

New York, February 6, 1899.

Due service of the foregoing notice of motion in the above cause is hereby admitted this 11th day of February, 1899.

Alexander Nielsen
Defendant.
by Edward Kaufmann
his Attorneys
and by Louis A. Kaeguen
his Counsel

4 SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1898. No.

Motion.

And now comes Emilie Saxlehner, the above named petitioner, by Joseph H. Choate, Arthur v. Briesen and Antonio Knauth, her attorneys and counsel, and moves this Honorable Court for a writ
5 of *certiorari* directed to the Honorable the Judges of the United States Circuit Court of Appeals, within and for the Second Judicial Circuit, commanding them forthwith to certify and return to this Court all proceedings by them had in the suit lately before them, wherein this petitioner was appellant and said Alexander Nielsen was appellee and appellant.

The matter involved herein relates to the question of trade-mark rights of the petitioner in and to the name "Hunyadi" and a red and blue label used in connection therewith upon complainant's bitter water, called "Hunyadi Janos." Your petitioner's right to said trade-mark and
6 label has been held forfeited by petitioner's laches by the United States Circuit Court of Appeals for the Second Judicial Circuit, which has ordered the petitioner's bill of complaint in the present case to be dismissed.

EMILIE SAXLEHNER,
Petitioner.

By JOSEPH H. CHOATE,
ARTHUR VON BRIESEN,
ANTONIO KNAUTH,
Her Attorneys and Counsel.

Due service of the foregoing motion is hereby admitted this 11th day of February, 1899.

Alexander Nielsen
Defendant.
by Edward Kaufmann
his attorney
and by Louis C. Raegener
his Counsel

SUPREME COURT OF THE UNITED STATES, 7

OCTOBER TERM, 1898.

No.

EMILIE SAXLEHNER, Petitioner,
In re. Petition for a writ of *certiorari* requiring the Circuit Court of Appeals in and for the Second Circuit to certify to the Supreme Court, for review and determination, the case of EMILIE SAXLEHNER,
Complainant and Appellant, 8

vs.

ALEXANDER NIELSEN,
Defendant and Appellant.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Emilie Saxlehner respectfully 9 shows:

FIRST.—That petitioner is a subject of the King of Hungary, and resides at Budapest, in the Kingdom of Hungary, and the defendant, Alexander Nielsen, is a resident and a citizen of the State of New York.

SECOND.—That the value of the matter in dispute in the above entitled cause, as appears by the bill of complaint therein, exclusive of interest and costs, exceeds the sum of two thousand dollars, and there is involved in said cause the validity or in-

10 validity of petitioner's trade-mark "Hunyadi" for bitter water and that of the label used by her, upon which several hundred thousand dollars have been spent for advertising in the course of more than thirty years, and which are of very large value to petitioner in her business.

THIRD.—That this suit was brought to restrain the defendant from infringement upon petitioner's trade-mark rights in the name "Hunyadi," and also from selling bitter waters bearing colorable and fraudulent imitations of the red and blue label used by petitioner in connection with said name "Hunyadi" on her bitter water called "Hunyadi Janos."

11

FOURTH.—That the undisputed facts relating to the adoption and use of petitioner's trade-mark and label may be shortly summarized as follows:

Andreas Saxlehner, your petitioner's husband and predecessor in business, now deceased, adopted the arbitrary and fanciful name, "Hunyadi Janos," for the bitter water of his springs at Budapest, Hungary, more than thirty years ago, and the same has since then been continuously used by him and your petitioner as a trade-mark in all civilized countries. The water was introduced into the United States about 1870, and has been continuously on sale in this country since said year. Every since its introduc-
12 tion it obtained the short name "Hunyadi Water" in this country, and is still sold and purchased under that name. The name "Hunyadi" was registered in the United States Patent Office by Andreas Saxlehner in the year 1887 as his trade-mark for bitter waters.

Since 1876 complainant's "Hunyadi" water has been sold in this country under a red and blue label bearing the name of the Apollinaris Company, Limited, Sole Exporters, which label was used until March, 1896. The Apollinaris Company was by contract the only party to which Saxlehner and complainant sold said "Hunyadi Janos" bitter

water for resale in this country, and when this contract ended in March, 1896, petitioner continued the business by selling the water in this country directly and using substantially the same label with slight modifications. A copy of the label used on the water sold to the Apollinaris Company, Limited, is hereto attached and marked "Exhibit A," and a copy of the label used by petitioner after the termination of said contract is also hereto attached, marked "Exhibit B." 13

Complainant's business amounts to about six million bottles per year of such water which she sells to all countries in the world from Hungary.

Since 1888 several other Hungarian bitter waters were imported bearing red and blue labels and the name "Hunyadi" in connection with some other name, every one of these labels being made in close imitation of Saxlehner's blue and red label. All these were sold in this country as "Hunyadi Water" with exception of those which had not the name "Hunyadi" on the label. Other Hungarian bitter waters have continued to be imported under their own labels and names, and these were not sold as or called "Hunyadi." The various waters sold under imitations of petitioner's name and label had no connection with one another either geographically or in quality or otherwise. 14

Until 1890 Saxlehner enjoyed no protection for the name "Hunyadi" or for *colorable* imitations of his label in Hungary, by reason of a lack of statutes upon the subject. He had repeatedly endeavored to obtain relief in Hungary against the imitators of his name and label, but without success, although he was by many years the first to adopt and use the name and label. He died in 1889. In 1890 a statute was passed in Hungary enabling the petitioner to sue imitators of her label, and in 1891 she commenced a series of litigations against all imitators of her label in Hungary, which were numerous. These litigations came to a successful termination in 1894 and 1895, when she succeeded in having all the imi- 15

16 tating labels canceled from the Hungarian Register of Trade-marks. The Statute of 1890, however, did not make provision for the registration of mere words or names as trade-marks, and petitioner therefore had no relief in court in Hungary against the use of the name "Hunyadi" alone or in connection with other words, such as "Lajos," until 1895, when another remedial statute was passed in Hungary permitting such relief. She immediately instituted new suits against the same persons against whom she had obtained the decrees canceling the imitating labels, and in October, 1896, obtained final decrees establishing her exclusive right to the name "Hunyadi" in Hungary for bitter-waters and can-
17 celing all the opposing trade marks employing that name in some connection or other. All these opposing marks were found to have been fraudulently contrived. Among the parties sued by petitioner in Hungary and against whom she obtained the relief described above in the years 1894 and 1896, was one Louis Schmidthauer, who furnishes the "Hunyady Lajos" water to the defendant. The defendant has for several years (it seems since about 1894) sold Hungarian bitter water under a red and blue label which is a fraudulent imitation of petitioner's label, bearing the name "Hunyady Lajos" and also the name "Schmidthauer Lajos" (meaning Louis Schmidthauer), and
18 stating that the defendant Alexander Nielsen is the sole agent for the United States and Canada. A copy of defendant's label is hereto attached, marked "Exhibit C."

In March, 1896, when the contract of the Apollinaris Company terminated petitioner also sued the Apollinaris Company in the Court of Chancery of England for an illegal use of the name "Hunyadi" upon a bitter water then introduced by that company under the name of a "New Hunyadi," and in the early part of the year 1897 obtained a final decree enjoining it from the use of the name "Hunyadi." Petitioner also brought in 1896 a suit

against Graef & Company, agents of the Apollinaris 19
Company in this country, which was settled by a voluntary abandonment of the use of the name "New Hunyadi" by said agents.

In October, 1896, when her rights had been finally recognized and established in Hungary, petitioner gave notice to all infringers in the United States, including the defendant, to stop further infringements, and a few months thereafter brought the present suit.

FIFTH.—The water which the defendant sells under the name "Hunyady Lajos" was first drawn from a spring at Nagy Igmand, in Hungary, and afterwards from a spring situated at Kocs, in Hun- 20
gary, the latter place being at a considerable distance from the former. Louis Schmidthauer sold this water in Hungary under a label closely simulating the red and white label used by petitioner in Hungary, and when exporting the said water to this country used the simulating red and blue label here. Schmidthauer is neither allowed to use the name "Hunyadi" nor a simulating label in Hungary now.

SIXTH.—The undisputed evidence showed that to physicians and the consuming public the name "Hunyadi" on bitter-water always meant and still means in the United States petitioner's "Hunyadi 21
Janos" water, and such name has not become generic for Hungarian bitter-waters, other such waters continuing to be imported and sold under other labels and names and not called "Hunyadi."

SEVENTH.—Petitioner's red and blue label bearing the name "Hunyadi Janos" was duly registered in the Chamber of Commerce and Industry at Budapest in 1890, and the name "Hunyadi" alone, without any label, in 1895, under the Hungarian statutes above referred to, and in accordance with the pro-

22 visions of the treaty between the United States of America and Austro-Hungary of June 1, 1872.

EIGHTH.—The Circuit Court decided that complainant had no exclusive right in this country, after the year 1888, to the name "Hunyadi," and denied an injunction against the name "Hunyady Lajos," but granted an injunction against the red and blue label and an accounting of damages, holding that the use of this simulated label was intentional and fraudulent in its object and in its results. It also held that the complainant was not chargeable with laches in not taking earlier measures to suppress defendant's use of the label.

23

A copy of the opinion of Judge Shipman of said Circuit Court is hereto attached and marked "Exhibit D."

NINTH.—Both parties appealed from the decree of the Circuit Court entered upon said decision to the Circuit Court of Appeals, which reversed said decree as to the label and remitted the cause with instructions to dismiss the bill with costs of the appeal.

A copy of the opinion of the Circuit Court of Appeals (two Judges only sitting) is hereto attached and marked "Exhibit E."

24

TENTH.—A petition for a rehearing was thereupon filed by petitioner in the Circuit Court of Appeals and the Court's attention called to the treaty above referred to between the United States of America and Austro-Hungary, but such petition was denied.

A copy of the opinion rendered by said Court is hereto attached and marked "Exhibit F."

The opinions of the Circuit Court and of the Circuit Court of Appeals in the suit of petitioner against the Eisner & Mendelson Company, to which reference is made in the opinions hereto attached, are fully contained in the petition for writ of *cer-*

tiorari in that case simultaneously presented by your petitioner. 25

ELEVENTH.—The decision of the Circuit Court of Appeals was rendered solely upon the supposed authority of the case of *Menendez* vs. *Holt*, 128 *U.S.*, 514, which your petitioner respectfully submits does not sustain the reasoning of the Court upon the facts which were clearly proved; and that said decision is opposed to the law which this Honorable Court has laid down in the case of *McLean* vs. *Fleming*, 96 *U. S.*, 245.

TWELFTH.—That the United States Circuit Court of Appeals committed a grievous error in overlooking or disregarding the fact that until the year 1895 your petitioner was unable to restrain in Hungary the use of the name "Hunyadi" in connection with the word "Lajos;" that consequently in the United States her right to restrain the use of that name upon waters imported from Hungary was doubtful, that petitioner did everything in her power to establish her rights in Hungary when statutory provisions made this possible and continued these efforts from 1891 until 1896, when she finally succeeded, and that among these litigations in Hungary was a suit against defendant's principal, Louis Schmidthauer. 26

THIRTEENTH.—That if the decision of the Circuit Court of Appeals is to be the law of the land, anybody can with impunity sell water from any source whatever and of any kind or quality whatever under a fraudulent imitation of your petitioner's red and blue label and with the name "Hunyadi" thereon, either alone or as a prefix to some other name; that public health is endangered thereby and the welfare of the community demands that such gross imposition upon physicians and patients alike be stopped by injunction. 27

28 FOURTEENTH.—That your petitioner has never by words or by deed abandoned her exclusive claim to the name "Hunyadi" or to her red and blue label, but is charged only with the imputed knowledge of manifold infringements and a furtherance of the same by her consignee the Appolinaris Co., which fraudulently designed to deprive your petitioner by such practices of the name "Hunyadi" for its own benefit, but has been prevented by injunction in England from carrying such fraudulent scheme to perfection.

FIFTEENTH.—That there is no "Hunyadi Spring" in existence in Hungary nowadays outside of the
29 "Hunyadi Janos" springs of your petitioner, and your petitioner's exclusive rights to the name "Hunyadi" are recognized in all civilized countries, excepting in the United States of America, where they are denied by said decision of the Circuit Court of Appeals. That such denial if sustained would practically destroy your petitioner's business in the United States established here for nearly thirty years.

SIXTEENTH.—The opinion of said Circuit Court of Appeals was rendered on the 5th day of January, 1899, and the decree of said Circuit Court of Appeals has been duly entered, and its mandate has
30 been issued.

SEVENTEENTH.—And your petitioner further represents that said decree of said Circuit Court of Appeals is final between the parties unless this Honorable Court should of its own motion direct the bringing up for review of said cause.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and send to

this Honorable Court, on a day certain to be therein 31
designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said cause therein entitled "Emilie Saxlehner, Complainant-Appellant, *vs.* Alexander Nielsen, Defendant-Appellant, No. 1023," to the end that the case may be reviewed and determined by this honorable Court as provided in Section 6 of the Act of Congress entitled "An Act to Establish Circuit Courts of Appeal and to define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States, and for other purposes," approved March 3, 1891; and that your petitioner may have such other or further relief in the premises as to this Court may seem appropriate 32
and in conformity with said act, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit in the said cause and every part thereof may be reversed by this Honorable Court.

And your petitioner will ever pray, &c.,

EMILIE SAXLEHNER,
Petitioner,

By JOSEPH H. CHOATE, ARTHUR VON BRIESEN and ANTONIO KNAUTH,
Her Attorneys and Counsel.

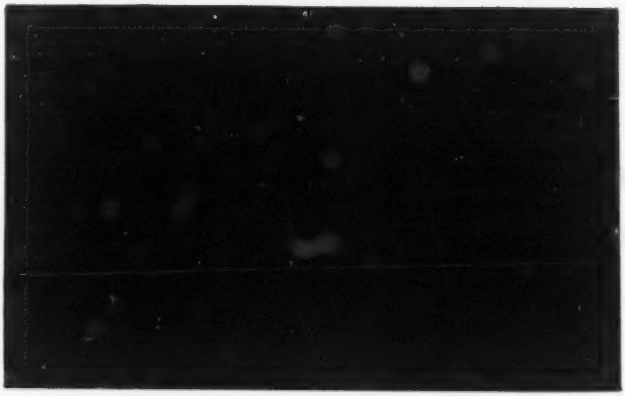
Due service of the foregoing petition is hereby 33
admitted this 11th day of February, A. D. 1899.

Alexander Nielsen
Defendant.
by Edward Kaufmann
his attorney
and by Louis C. Radegener
his Counsel

Complainant's Labels.

"Exhibit A."

"Exhibit B."



Defendant's Label.

"Exhibit C."

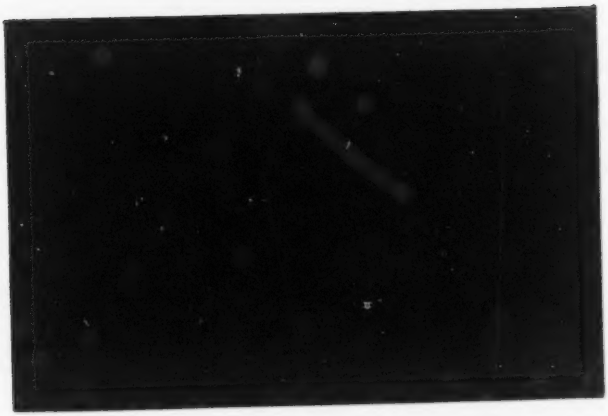


Exhibit D.

34

UNITED STATES CIRCUIT COURT

FOR THE EASTERN DISTRICT OF NEW YORK.

EMILIE SAXLEHNER

vs.

ALEXANDER NIELSEN.

35

SHIPMAN, *C. J.*—This is a bill in equity by a resident of Budapest in Hungary and a subject of the King of Hungary, against a citizen of Brooklyn and the State of New York, to enjoin him from the sale of Hungarian bitter water under the name of "Hunyadi Lajos," and in bottles bearing labels which imitate those used by the complainant in her business of selling in this country a Hungarian bitter water called Hunyadi Janos.

A similar action by the complainant against the Eisner & Mendelson Company to restrain that company from the use of the name Hunyadi Matyas, has recently been tried before me in the United States Circuit Court for the Southern District of New York, upon a full record, and the facts in regard to the history of the name Hunyadi in connection with the sale of Hungarian bitter waters, and to the history of such sales in this country, and to the exclusive right of the complainant to the name, and the conclusions of the Court are stated at length in the opinion which has just been filed and need not be formally repeated. The record in this case is much shorter and gives the Hunyadi history in a somewhat disjointed way, but the conclusion that the complainant had no exclusive right

36

37 in this country after the year 1888 to the name Hunyadi, is unaltered.

The history of the complainant's red and blue label, which has been used in this country upon the bottles of her Hunyadi Janos water, was also stated in the Eisner & Mendelson case. The firm of Bell, Pollitz & Co., of which Nielson was a member, began to import Hungarian bitter water into this country in 1892, under the name of Hunyadi Lajos, and to sell it in bottles with labels closely resembling the red and blue labels of the complainant. The water was called by that name in Hungary and the importers used the label because it was associated in the minds of the public with the
38 character and reputation of the Janos water, and because its use greatly facilitated the sale of any Hunyadi water and created for the Lajos water a market without trouble or expense. The use of this simulated label was intentional and was fraudulent in its object and in its results. It does not appear in the record when the partnership of Bell, Pollitz & Co. was dissolved and when Nielson took the business upon himself, but he continued the use of the label upon the bottles which he sold until after the commencement of this suit, when he changed the label. He was notified of the alleged infringement in October, 1896. The complainant is not chargeable with laches in not taking earlier measures to
39 suppress the defendant's use of the label.

There can be no decree against the use of the name Hunyadi. Let there be an interlocutory decree for an injunction against the infringement of the complainant's red and blue label, and an accounting of the damages to the complainant arising from the infringements since the defendant's sole ownership of the business. The question of costs will be reserved until final decree.

(Endorsed)—Opinion.—Filed June 30, 1898.

Exhibit E.

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

EMILIE SAXLEHNER,
Complainant-Appellant,

vs.

ALEXANDER NIELSEN,
Defendant-Appellant.

Cross appeals from a decree of the Circuit Court, Southern District of New York.

Per Curiam:

The questions raised in this cause are substantially the same as in Saxlehner *vs.* Eisner & Mendelson, decided herewith. The Circuit Court held that complainant had no exclusive right in this country to the name "Hunyadi," in which conclusion we concur. The Circuit Court further granted an injunction against continued use of the red and blue labels, and an accounting for past infringements by the use of such labels. For reasons stated in the Eisner case the decree as to the labels is reversed and cause remitted with instructions to dismiss the bill, with costs of this appeal.

43 **Exhibit F.**

U. S. CIRCUIT COURT OF APPEALS.

SECOND CIRCUIT.

EMILIE SAXLEHNER

vs.

EISNER & MENDELSON COMPANY.

SAME

44 vs.

SIEGEL-COOPER CO.

SAME

vs.

RUDOLPH GIES.

SAME

vs.

45 LOUIS MARQUET.

SAME

vs.

ALEXANDER NIELSEN.

Per Curiam:

We are unable to assent to the proposition that the provisions of the treaty are to be construed so

as to hold that when the public in this country has 46
acquired through the owner's laches, the right to use a trade name and a trade-mark, such right is abrogated, whenever by the operation of some subsequent Hungarian law the trade name and trade-mark is secured to him in Hungary. For that reason petition for reargument is denied.

No. 215 33

Brief of Johnson, Briesen & Knauth
for Petitioner.

Filed Mar. 8, 1900

MAR 8 1900
JAMES H. McKENNEY
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 215.

EMILIE SAXLEHNER, PETITIONER,

vs.

ALEXANDER NIELSEN.

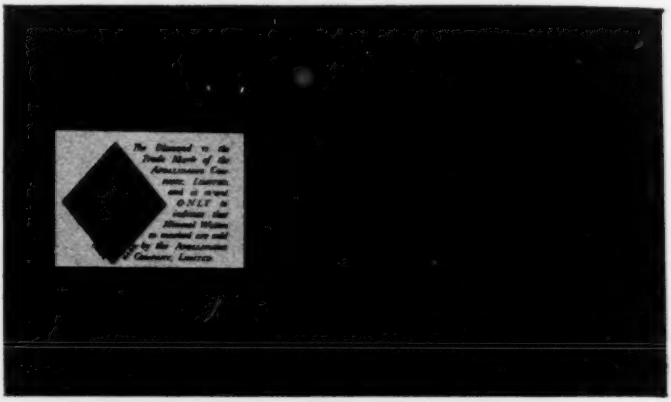
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

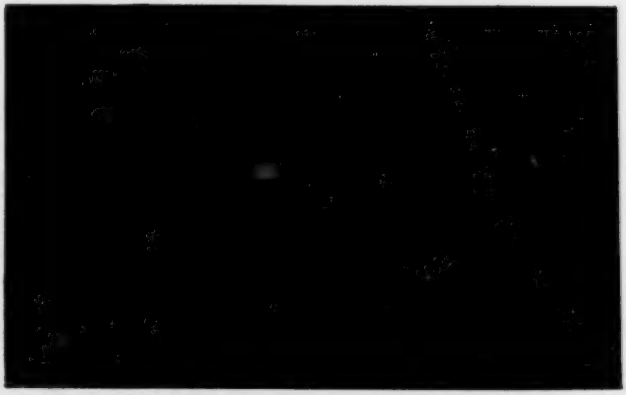
JOHN G. JOHNSON,
ARTHUR v. BRIESEN,
ANTONIO KNAUTH,
Of Counsel for Petitioner.

Complainant's Labels.

"Exhibit A."

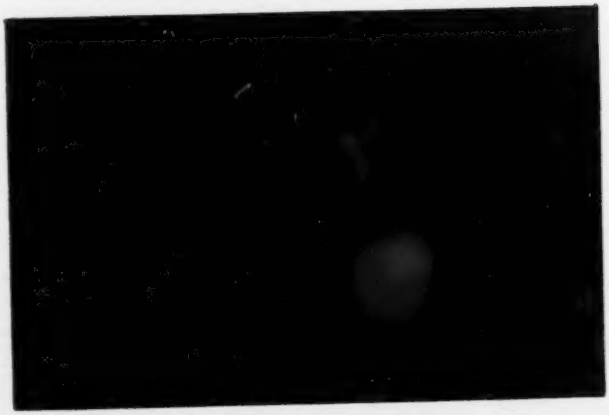


"Exhibit B."



Defendant's Label.

"Exhibit O."



Supreme Court of the United States.

No. 215.

EMILIE SAXLEHNER, Petitioner,
Complainant-Appellant,

vs.

ALEXANDER NIELSEN,
Defendant-Appellee.

BRIEF ON BEHALF OF COMPLAINANT AS PETITIONER AND APPELLANT.

The above entitled case is before this Court by virtue of a writ of *certiorari* issued by this Court to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1899. The facts and questions involved in it are in many respects similar to those involved in the cases of the same complainant and petitioner, Nos. 211, 212, 213 and 214; but there is a separate record of the pleadings and proofs presented for this case, No. 215, which was defended by other counsel, and without any stipulation connecting the case with the four cases preceding it on the calendar. It was decided by the courts below mainly upon the strength of the proofs adduced by the defendant Eisner & Mendelson Company in the case No. 211 against the protest of complainant's counsel, who

claimed that the present case should be decided on its own proofs and merits.

The bill of complaint complained of infringement of complainant's trade-mark rights to the name "Hunyadi," and the red and blue label used by complainant for the "Hunyadi Janos" water in this country, by reason of defendant's use on competing bitter waters of a similar red and blue label bearing the name "Hunyady Lajos," and an arrangement of a medallion picture and accompanying print, all devised in close simulation of the "Hunyadi Janos" label. It alleged that the defendant's water was imported by him from one Louis Schmidthauer, the owner of a spring at Kocs in Hungary and as whose "sole agent" defendant represents himself on the bottles of this bitter water. It further alleged that the trade-mark "Hunyady Lajos," which had been used by said Schmidthauer for this water in Hungary, had been canceled by a final decree of the Hungarian Minister after a litigation had by the complainant with Schmidthauer in Hungary, and that by the laws of Hungary the further use of the name "Hunyady Lajos" was forbidden to said Louis Schmidthauer, his agents and employees. It prayed for an injunction against the use of the name and the label, an account of profits and damages and costs (Record, p. 5).

The defendant's answer pleaded that the name "Hunyadi" and the complainant's style of bottles, capsules and labels had become generic for Hungarian bitter waters and that they had been abandoned to the public by the acquiescence and consent of complainant in and to their general use by other dealers. No abandonment by positive affirmation or action was pleaded, but the defendant alleged "that in view of the proprietary rights acquired by "this defendant and others, by virtue of such ac- "quiescence, abandonment, and the laches of the "complainant and her predecessor, it would be in- "equitable to disturb the defendant from continuing "to do the acts complained of."

The answer failed to state what proprietary rights the defendant, who claimed to be an agent of Schmidthauer, had acquired, and there is no intimation in the proofs of their existence (Record, pp. 101–102).

The Circuit Court in its opiniou, rendered on June 30, 1898, held with reference to this infringement as follows:

> "*The firm of Bell, Pollitz & Co., of which Nielsen was a member, began to import Hungarian bitter water into this country in* 1892, *under the name of 'Hunyady Lajos,' and to sell it in bottles with labels closely resembling the red and blue labels of the complainant. The water was called by that name in Hungary, and the importers used the label because it was associated in the minds of the public with the character and reputation of the Janos water, and because its use greatly facilitated the sale of any Hunyadi water, and created for the Lajos water a market without trouble or expense. The use of this simulated label was intentional and was fraudulent in its object and in its results. It does not appear in the record when the partnership of Bell, Pollitz & Co. was dissolved and when Neilsen took the business upon himself, but he continued the use of the label upon the bottles which he sold until after the commencement of this suit, when he changed the label. He was notified of the alleged infringement in October,* 1896. *The complainant is not chargeable with laches in not taking earlier measures to suppress the defendant's use of the label*" (Record, p. 151).

The Circuit Court also held that there could be no decree against the use of the name "Hunyadi," but granted a decree for an injunction against the infringement of complainant's red and blue label, and

an accounting of the damages arising from the infringements since the defendant's sole ownership of the business.

An interlocutory decree was entered in conformity with this opinion (Record, p. 152), from which both parties appealed to the Circuit Court of Appeals. Complainant's petition for such appeal is found on page 153 of the Record, and complainant's assignment of errors on page 155.

The Circuit Court of Appeals decided the case wholly in favor of defendant, rendering an opinion as follows:

> "PER CURIAM: *The questions raised in this cause are substantially the same as in Saxlehner* v. *Eisner & Mendelson decided herewith. The Circuit Court held that complainant had no exclusive right in this country to the name 'Hunyadi,' in which conclusion we concur. The Circuit Court further granted an injunction against the continued use of the red and blue labels, and an accounting for past infringements by the use of such labels. For reasons stated in the Eisner case the decree as to the labels is reversed, and cause remitted with instructions to dismiss the bill, with costs of this appeal*" (R., p. 163).

A decree of dismissal was thereupon entered (Record, p. 164), whereupon a motion for rehearing was made to bring to the attention of the Court the provisions of the treaty between the United States and the Austro-Hungarian Empire of November 25, 1871, but the motion for a reargument was denied (Record, pp. 165–167). On March 8, 1899, a writ of *certiorari* was granted by this Court (Record, pp. 168–9).

Complainant's title was clearly proved.

The adoption of the name "Hunyadi" as the name of Saxlehner's spring of bitter water in the year 1863 was shown by a certificate of the Municipal Council of Buda dated January 19, 1863 (Record, p. 79), and by other similar certificates which were all offered in evidence without objection. It was shown that Andreas Saxlehner, complainant's predecessor in business, had been in the uninterrupted enjoyment of the name "Hunyadi Janos" as a trade-mark for bitter water ever since 1865 in Hungary; that this name had in the course of time also become the name of the bitter water establishment conducted by Andreas Saxlehner, and up to the present time had been continuously the name of the water as sold in the markets of the world They also showed that in the year 1873 Andreas Saxlehner registered a trade-mark in Hungary for this bitter water, in which the name "Hunyadi Janos" was contained. This trade mark was re registered by the complainant in Hungary in the year 1890, complainant continuing the business as the legal heir and successor of Andreas Saxlehner (see Complainant's Exhibits Nos. 18, 19, 20, 22, 24, 25, and 26, Record, pp. 79 to 89).

The proofs also showed that bitter water coming from other springs in Hungary, like the "Deak Ferencz" (Franz Deak), the "Franz Joszef," the "Hildegarde," the "Szechenyi" and the "Æsculap" springs was sold in Hungary and elsewhere and in the markets of this country and continued to be sold under these other names and labels differing from those used by Saxlehner, which waters have never been called "Hunyadi" in this country or elsewhere (Record, pp. 31–33).

The sales of complainant's "Hunyadi Janos" water in this country since about 1870, first under a red and white label and afterwards under the red and blue label, were proved by complainant's wit-

nesses Adolph de Bary (Record, p. 37); Seymour McCullagh (Record, p. 8), John R. Agnew (Record, p. 49), and others. Their testimony established that for many years past, even previous to the year 1876, the "Hunyadi Janos" water has been known in the United States as "Hunyadi Water," which soon became its short colloquial name, and that it has continued to be recognized by the medical profession and the trade as the only water properly so named, and is still bought and sold in the United States as "Hunyadi" water. The testimony of a large number of witnesses supported this contention of the complainant.

The defense that the name "Hunyadi" and the label have become generic for Hungarian bitter waters is not sustained by the proofs.

In order to sustain the allegations of the answer, defendant called three witnesses, Charles O. Weisz, Theodore W. Edwards and Isidor Haldenstein.

Weisz very clearly testified that the name "Hunyadi" had not become generic in the sense of being synonymous with Hungarian bitter water, because he kept other Hungarian bitter water from Buda Pest in stock and for sale during the whole period of time testified to by him, which was not known or sold or demanded under the name "Hunyadi." He admitted that various imitations of Saxlehner's "Hunyadi Janos" water, which he sold for several years past, were named "Hunyadi" by him in his trade with other druggists, retailers, only because the name "Hunyadi" was on the label. Even then the name Hunyadi was only used in connection with some other name. His testimony, therefore, only establishes the existence of a number of imitations on the market without establishing anything further. He is the same witness who in the case against the

Eisner & Mendelson Company frankly admitted that whenever GENUINE "Hunyadi" was asked for he always gave and would give out "Hunyadi Janos" water (Record, pp. 103 to 116 and 132).

Defendant's witness T. W. Edwards likewise frankly confessed that the "Hunyadi Janos" water always was and still is the only water known to him which rightly deserves the name "Hunyadi." He testifies that if a customer comes to him demanding a bottle of GENUINE "Hunyadi," he furnishes him "Hunyadi Janos," and does the same whenever the customer simply asks for a case of "Hunyadi." This is invariably his practice, and has been the rule of his house, which is a large wholesale house (Record, p. 149). His testimony that he does not call the "Hungaria" water, or the "Apenta" water, or the "Franz Josef" water, which are all Hungarian bitter waters, "Hunyadi" waters would alone dispose of the contention that "Hunyadi" had become a generic name for Hungarian bitter waters (Record, p. 148).

These two witnesses, therefore, admitted that the other so-called "Hunyadi" waters were spurious, and were only called by complainant's name because that name was on the label.

The only witness who pretended to testify on defendant's behalf, that the name had become generic in this country is Isidor Haldenstein. Haldenstein was formerly in the employ of the Apollinaris Company, Limited, or its local agents in New York City, and in that character assisted the Apollinaris Company in carrying out its disloyal scheme to introduce in place of Saxlehner's water a "New Hunyadi" water at the termination of the contract with Saxlehner. The malicious character of Haldenstein's testimony is apparent from his insinuations of unfair dealing on the part of Saxlehner, which insinuations had been completely disproved in the litigation between the Apollinaris Company and Paul Scherer (27 F. R., p. 18), and from his studied attempt to make it appear that *all* Hungarian bitter waters had

for the last six years or more been imported under names employing "Hunyadi," and under red and blue labels. This is contradicted by defendant's other witnesses (Record, p. 138). He even goes so far as to reproach complainant for confusing and disturbing the trade in these fraudulent waters by intimidating circulars (Record, p. 142), and throughout his testimony will be found a desire to magnify and justify the importation of the fraudulent labels.

The table of importations of the waters coming in under imitating labels which was prepared by the witness was offered in evidence over the objection of complainant's counsel that it was incompetent evidence (Record, p. 118), and this objection was repeated when, upon cross-examination, it was further ascertained that the statements contained in that table were clearly based on hearsay evidence making any investigation of their truth impossible (Record, p. 130). We submit that the character of the evidence furnished by him is such that his mere assertion of the fact that the name and label had become generic for Hungarian bitter waters in this country is not entitled to consideration.

The substance of his testimony was that from the year 1886 to the year 1896 *the trade* understood "Hunyadi" to represent one of various aperient waters coming from the neighborhood of Budapest, Hungary, and not Saxlehner's water alone, and that these various waters were distinguished in the trade by the different suffixes added to the name "Hunyadi" (Record, pp. 117 to 121). No attempt was made to show what the *public* meant by the use of the name "Hunyadi," and the knowledge and power to distinguish on the part of the trade can readily be admitted by complainant. This defense was very thoroughly considered by the U. S. Circuit Court of Appeals in the recent case of *Pillsbury* vs. *Pillsbury-Washburn Flour Mills Co.*, 64 *F. R.*, 841, 849, and was scathingly denounced by Jenkins, Circuit Judge, who delivered the opinion of the Court. Speaking of the defendant's claim that by

adding to the objectionable words others which truly described and distinguished his goods, he said:

> *" They sell their goods with the false and simulated brands upon them to wholesale and retail dealers at a price below that for which the genuine product of the Pillsbury Mills can be purchased by them. They disclose to the retail dealer their mode of procedure and their object. They appeal to the greed of their customers to purchase an inferior quality of flour thus falsely branded with the name of a superior article, that the dealers may palm it off as the genuine article. No ingenuity could devise a more effectual way to pirate a good-will. In the large, bold, displayed words: 'Pillsbury's Best' and 'Pillsbury's Best XXXX,' they address the general public. In their dealings with middlemen they declare the truth, making them accomplices in the fraud for their share of the profit. True representations in aid of false ones, but aggravate the fraud."*

Complainant proved by an abundance of testimony of physicians, druggists and dealers in mineral waters that even at the present time the public understands under the name "Hunyadi" only Saxlehner's "Hunyadi Janos" water, and that any other bitter waters bearing similar names and labels are recognized by our public as imitations.

A number of physicians of high standing were called as witnesses by the complainant, among whom was the Medical Health Commissioner of the City of New York (Dr. Fowler), and the sum and substance of their testimony was that physicians who prescribe and patients who use "Hunyadi" water mean complainant's water when referring to or speaking of "Hunyadi Water." We refer the Court to the depositions of Doctors Robert M. Taft (Rec-

ord, p. 61); Augustus Caillé (Record, p. 62); James H. Dew (Record, p. 63); William A. Ewing (Record, p. 64); Charles A. Kinch (Record, p. 70), and George B. Fowler (Record, p. 71).

This proof shows that for a period of nearly thirty years complainant's "Hunyadi Janos" water has been and still is sold on the market of this country as "Hunyadi" water, and is the only water recognized by the public to be entitled to that name.

The depositions of the druggists Martin Held and Max Wustrow show that in certain localities druggists have been acquainted with other Hungarian bitter waters sold under red and blue labels and under names of which the name "Hunyadi" formed a part. It appears quite clearly, however, from their testimony that the druggists well knew the "Hunyadi Janos" water to be the water which has given reputation to the name "Hunyadi," and that the public expect to obtain the complainant's water when demanding "Hunyadi Water." Similar testimony was given by John R. Agnew, accountant in the employ of Park & Tilford (Record, pp. 52, 48 and 49).

We submit that the evidence of the defendant utterly failed to establish the fact that either the label or the name of complainant's bitter water had lost its meaning. Falling far short in this, the evidence was without force as a defense and was incompetent to prove any defense, especially where no knowledge of the fraudulent practice by the complainant was proved.

Taylor vs. *Carpenter*, 2 *Wood & M.* 1.

The Circuit Court's finding of fraud was well supported by the evidence.

A comparison of the bottles sold by the defendant with complainant's bottles of Hunyadi Janos Water

shows at a glance the intention of deception. The label has the same characteristic division into three panels, the middle panel being of a reddish brown, similar to the color of complainant's middle panel; the name "Hunyady Lajos" is printed in conspicuous characters above and below the medallion with the portrait, and underneath the same is a cautionary notice very similar to that contained on Saxlehner's bottles. The blue side panels contain printed directions in a manner similar to those on Saxlehner's bottle, and above the lable runs a strip of bluish paper all across the label with words printed in black type, all as on Saxlehner's label. This, added to the characteristic and unusual shape of the bottle, with its short neck and straight sides and with the capsule on which the portrait is impressed surrounded by the inscription "Hunyadi Lajos Keserüviz," and with the impression in the bottom of the bottle of the name "Hunyady Lajos," could only be the result of a very studied effort at imitation and deception. There is no Hunyady Lajos known to history, and as Pollitz, the defendant's former partner, testifies, the name was purely selected for the purpose of having "Hunyady" on the bottle. The same intention prevailed in selecting the colors and arrangement of the label (Record, pp. 52–56). No attempt at denial has been made by the defendant, who did not come forward to testify on his own behalf.

The cautionary notice on defendant's bottles says that the name "Schmidthauer Lajos" is impressed upon the metal capsule, but this is not true. The capsule shows in fact the impression of the name "Hunyady Lajos." The defendant adds to that the statement on the bottle, "Counterfeits of the water as well as imitations of the capsule or the label are subject to penal prosecution. Only strict attention to the label will protect against deceptions." Noth ing could be better designed to awaken among unwary purchasers the belief that this and no other

was the genuine water. Defendant's water does not even come from the neighborhood of Budapest, but from a spring situated at Kocs, more than a hundred miles from Budapest and is, of course, of a different character. Its analysis is totally different from that of the Hunyadi Janos water, as will be seen by comparing the analyses on the two bottles. It has no reputation of its own, nor does it apparently make any difference to Schmidthauer what kind of water it is that he sells under the name, or where he takes it from. He appears to have had two such springs successively. The first Hunyady Lajos Spring was situated at Nagy Igmand. This spring having been closed by the authorities for sanitary reasons, he called another spring (at Kocs) "Hunyady Lajos," and continued to take the water from the latter spring (Record, pp. 93–96).

The effect of the use of this label and name by defendant in this country is shown by the evidence of Tito Toscani, who summed up his experience in canvassing the trade in this country as follows:

> "*I found that it was the smaller druggists that would usually sell the Hunyady Lajos water for the genuine Hunyadi Janos. The old established houses and larger houses in the country would tell me that they only sold the genuine Hunyadi Janos and would not have anything to do with the imitations, having known the Hunyadi Janos for from eighteen to twenty years.*"

He brought specific proof of several fraudulent substitutions by druggists and no attempt was made to disprove or even challenge his statements (Record, pp. 41–43). Similar evidence was given by William Stempel (Record, pp. 44–48).

Neither the decision of the Circuit Court nor that of the Circuit Court of Appeals can be sustained on the proofs in this case.

The opinion of the Circuit Court referred to the case against the Eisner & Mendelson Company, decided by the Court at the same time, and then continues:

> "*The record in this case is much shorter and gives the Hunyadi history in a somewhat disjointed way, but the conclusion that the complainant had no exclusive right in this country after the year* 1888 *to the name Hunyadi is unaltered.*" * * * "*There can be no decree against the use of the name Hunyadi*" (Record, p. 151).

In the case against the Eisner & Mendelson Company the same court had come to the conclusion, upon the proofs offered in that case, that the complainant had by the "positive acts and affirmations of its consignee, the Apollinaris Company, Limited," *abandoned* any exclusive claim to the name Hunyadi, for which reason it denied an injunction on the name. Whatever may be the merits of the defendant's proofs in the case against the Eisner & Mendelson Company, we submit that the present case does not contain those proofs or any proofs upon which the Court could come to the conclusion that the name had been abandoned and likewise that the Circuit Court of Appeals could not conclude upon *these* proofs that complainant was guilty of laches, a conclusion not shared by the Circuit Court.

The complainant proved an undoubted title to the name "Hunyadi" and to the red and blue label of the Hunyadi Janos water by first adoption and use in this country. She proved title to the name further by the certificate of registration of the trade-mark

" Hunyadi " registered by Andreas Saxlehner in the United States Patent Office on April 5, 1887 (Record, p. 98). She also proved that the Hunyadi Janos label was registered in the Chamber of Commerce and Industry of Budapest, so as to call into action the provisions of the treaty between this country and the Austro-Hungarian Empire of the year 1871 for her protection (Record, pp. 82 to 85).

Complainant having thus proved a clear title to the name " Hunyadi " and to the red and blue label and having shown that defendant had adopted a similar label and a similar name for no other purpose than that of *fraudulently* trading upon the reputation of complainant's bitter water, it was incumbent upon the defendant to prove a conclusive defense to the suit in order to entitle him to a decree dismissing the bill.

The record in the case shows that there have been infringements on the markets of this country for a number of years, since about 1888, but it does not show that complainant had any knowledge thereof. It also shows that previous to the year 1890 complainant had no relief in Hungary against these imitations on account of a lack of statutory protection (Record, pp. 36, and 22 to 23), and that as soon as statutory protection in Hungary made a proceeding against infringers possible there, it was instituted and carried on from the year 1891 until the fall of 1896 (Record, pp. 22 to 23). The decree against Louis Schmidthauer, which was the final outcome of these proceedings, was rendered on October 9, 1896, and canceled Schmidthauer's illustrated trademark called " Hunyady Lajos," registered by him on July 16, 1894, sub. No. 37, on the ground of its unlawful similarity to Saxlehner's label and also on the ground of its use of the name " *Hunyady* " (Record, pp. 92 to 93). The record also shows that as early as the year 1886 Louis Schmidthauer had registered a trade-mark for Hunyady Lajos bitter water, which he at that time drew from a spring at Nagy Igmand. This was canceled pur-

suant to an order of the Hungarian Minister of Commerce, issued March 19, 1894, as a result of the suit instituted by complainant in 1891 (Record, p. 89). The second Hunyadi Lajos label registered by Schmidthauer in Hungary on July 16, 1894, sub. No. 37, was canceled in accordance with the decree of the Minister, of October 9, 1896, on or before March 24, 1897 (Record, p. 90).

This proves by documentary evidence, which was not objected to on the ground of incompetency, what the witness Kalman Saxlehner had testified to from his general knowledge of the circumstances, and shows that substantially the same questions which are here before the Court (excepting the colors of the labels which were red and white in Hungary) were litigated between this complainant and this defendant's principal in Hungary from the summer of 1891 until October, 1896, when complainant obtained a final victory. The first importations of the "Hunyady Lajos" water into this country took place in 1892, and after complainant had commenced her litigation against Schmidthauer, and defendant, as Schmidthauer's agent, must be presumed to have had knowledge of complainant's suit against his principal. He can plead neither ignorance nor innocence. Under these circumstances it seems inconceivable how complainant could be justly accused of laches in not proceeding sooner against this defendant who professed to act as the "Sole Agent" of Louis Schmidthauer in the United States. We will not repeat the arguments which we have made on this point in the case against the Eisner & Mendelson Company, which all apply to the present case with the same force.

Neither is there any ground upon which the defendant could claim an equitable estoppel. He does not claim to have known anything of the litigations commenced by the Apollinaris Company, Limited, against Andres and Ungar in the year 1886, and discontinued in the year 1888, nor does he claim to have known anything of the circulars of the Apol-

linaris Company, Limited, and indeed he has not come forward at all to testify in answer to the charges of fraud which have been brought against him and substantiated by a large array of witnesses. The record of those cases was not even offered in evidence. There is no claim that the defendant has expended money or built up any business in good faith on the strength of anything that complainant did, and the only excuse which is offered is that there were others who did likewise. That this is no defense at all is well established.

Singer Mfg. Co. *vs.* June Mfg. Co., 163 U. S., 169, 202.
Cuervo *vs.* Jacob Kenkel Co., 50 F. R., 471.
Gillott *vs.* Esterbrook, 47 Barb., 455.
Filley *vs.* Fassett, 44 Mo., 168.
Taylor *vs.* Carpenter, 3 Story, 458.

In deciding this case against complainant the Courts below therefore necessarily acted, not on the proofs offered in this case, but on the proofs offered in some other case to which this defendant was not a party and which was not by stipulation connected with the present case in any shape whatever. This, we respectfully submit, the Courts below had no power to do.

In re Manderson, 51 *F. R.*, 501.
Am. Fibre Chamois Co. vs. *Buckskin-Fibre Co.*, 72 *F. R.*, 508, 514.
Brown vs. *Piper*, 91 *U. S.*, 37.

The principle of *res adjudicata* cannot be invoked, because the parties in the two suits are not the same, nor is there any priorty of parties or subject matter. Public interests or the convenience of the public cannot be legitimately claimed for it, because the public welfare cannot be served by sanctioning and perpetuating an intended fraud, found by the Circuit Court to have been committed.

In order to enable the Court below to take judicial

notice of the fact that the name Hunyadi had become public property in this country it would have been necessary and essential that knowledge of this fact was in the possession of the Court without resorting to any evidence in this case or any other case. There is certainly no foundation for making such a broad claim on behalf of the imitators of Saxlehner's label. The evidence in this case is overwhelmingly to the effect that the name "Hunyadi" is even nowadays recognized by the medical profession, by dealers in mineral waters, druggists, grocers and the public as belonging properly only to the Hunyadi Janos water and therefore to the complainant. The Circuit Court even came to the conclusion that the other dealers in mineral waters "*could not name their waters 'Hunyadi'*," although for the reasons stated by the learned Judge delivering the opinion of the Circuit Court he believed himself compelled to find that those dealers could use the name "Hunyadi" in connection with some other suffix than "Janos." To this conclusion he came on the theory of a legal abandonment brought about by Saxlehner's consignee whom he deemed sufficiently enabled by circumstances to make such abandonment. The Circuit Court did not find that the evidence disclosed that the name Hunyadi had become a part of the English language and as such properly descriptive of Hungarian bitter waters or bitter waters in general, and indeed there would be no warrant in the evidence for such a contention. He also decided in terms that Saxlehner was not guilty of laches in not proceeding earlier and on that point we submit the evidence sustains the view of the Circuit Court and not that of the Circuit Court of Appeals. Saxlehner and the complainant resided on another continent. In this country there was only a consignee who was shown to have been almost constantly in litigation with complainant and her predecessor. That consignee was also shown to have laid a plan of defrauding Saxlehner by gradually undermining his right and title to the

name so as to be able to take advantage of it for its own purposes upon a termination of the contract which it had in its power to bring about at any time. Previous to the year 1895, when Kalman Saxlehner came to this country, the complainant had no business representative here, and there is no proof in the case that of the doings of the defendant or other infringers in this country she had any earlier notice. No attempt has been made in this case to prove such notice on her part, and there are no circumstances which would raise a presumption of such knowledge. The fact that Andreas Saxlehner registered his trade-mark Hunyadi in this country in the year 1887, proves conclusively his intention to claim this mark for himself, and the fact that complainant litigated her rights against defendant's principal in Hungary from 1891 until 1896, is evidence of an energetic insistance on those rights, and disproves any charge of laches.

It is with a sense of deep conviction of the justice of complainant's claim under these circumstances, that we respectfully submit that the Circuit Court of Appeals did not apply the principles laid down by this Court in deciding the cases of *McIntire* vs. *Pryor*, 173 *U. S.*, 38; *McLean* vs. *Fleming and Holt* vs. *Menendez*.

When that litigation was ended, in October, 1896, she gave notice by her attorneys to the defendant to stop (Record, p. 56), and in the month of January, 1897, commenced the present suit (Record, p. 8). The defendant, a few months after the commencement of the action, discontinued the use of the red and blue label, but did not discontinue the use of the name "Hunyadi Lajos," and has since claimed to be entitled to the use of each of them.

It is evident, therefore, that the present record does not disclose any kind of defense which would be available to the defendant, and that complainant is clearly entitled to relief against him in the manner as prayed in her bill of complaint.

An account of damages and profits has only been

withheld when the defendant's infringement had been suffered to continue for years with full knowledge and no reasonable effort was made by the complainant to assert his rights against the same, on the ground of an implied acquiescence in the doings of the defendant. No such acquiescence being shown, but on the contrary, a long continued contest about the same questions with defendant's principal in Hungary, a decree for profits and damages such as granted by the Circuit Court was therefore clearly justified, but should have been extended to the use of the name "Hunyadi" for the reasons above stated.

Collins Co. *vs.* Oliver Ames & Sons' Corporation, 20 Blatchf., 542.
Estes *vs.* Leslie, 27 F. R., 22.
Sawyer *vs.* Kellogg, 9 F. R., 601.
Graham *vs.* Plate, 40 Cal., 598.
Benkert *vs.* Feder, 34 F. R., 534.
Pitts *vs.* Hall, 2 Blatchf., 229.
Atlantic Milling Co. *vs.* Robinson, 20 F. R., 217, and 27 F. R., 24.

We therefore respectfully submit that the decree of the Circuit Court of Appeals in this case should be reversed in all its parts and that the complainant should be accorded a perpetual injunction against the unlawful use of the name "Hunyadi" and against any imitation of the red and blue label, together with an account of the profits and damages and the costs of the suit.

Respectfully submitted,

JOHN G. JOHNSON.
ARTHUR v. BRIESEN.
ANTONIO KNAUTH.

Of Counsel for Petitioner.

No. Rec'd. 33

MAR 17 1900
JAMES H. MCKENNEY
Clerk

Supreme Court of the United States.

Brf. of Raegener for Respondent

OCTOBER TERM, 1899.

No. 615.

Filed Mar. 17, 1900.

EMILIE SAXLEHNER,

Petitioner,

vs.

ALEXANDER NIELSEN,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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1900.

Supreme Court of the United States.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN,
Respondent,

October Term
1899. No. 215.

Brief on Behalf of Respondent.

The above entitled cause comes before this Court upon a writ of certiorari issued to the United States Circuit Court of Appeals for the Second Circuit on March 6, 1899. The questions involved are substantially the same as those raised in the case of this petitioner against Eisner & Mendelson Company and against Siegel-Cooper Company, Rudolph Giess and Louis Marquet, said cases being Nos. 211, 212, 213 and 214 upon this calendar. Upon the original hearing in the Circuit Court, and upon hearing of the appeal, also, this cause was heard, together with said causes, and the opinions of both Courts in this case refer to the opinions of said Courts in those cases. It is urged on behalf of the petitioner that this case should be considered solely upon its own proofs and without any regard whatever to the disposition made by this Court of the principal case against Eisner & Mendelson Company. It is respectfully submitted that this view is erroneous. The petitioner is here seeking to enforce, not a private contractual right, but a mo-

nopoly in derogation of public right, and the principal party in interest is the public itself. To maintain her right she must prove her title at the time of the alleged infringement. If in the other cases this Court should find either that complainant never had any trademark rights in the word "Hunyadi" standing alone or that, having such rights, she had lost the same prior to the time of the alleged infringement, then such finding is *res adjudicata* as against the petitioner, as much so would be any finding of this Court as to her status, and this respondent, as well as all the world, is entitled to rely upon the fact so found.

The facts relating to the adoption of the trademark by complainant's predecessor in business, Andreas Saxlehner, and to the laches and abandonment of such rights as were formerly acquired are fully stated in the opinion in the principal case written by Judge Shipman and reported in 88 Fed. Rep., 61. The opinion of the Circuit Court of Appeals for the Second Circuit (91 Fed. Rep., 536) refers to said opinion in the following words:

> "The opinion of the Judge who heard the cause in the Circuit Court is most careful and exhaustive. The voluminous facts are most fully rehearsed, and an examination of the record shows that they are accurately stated."

Both these opinions, while not printed in the record in this cause, must necessarily be considered by this Court in order to arrive at an understanding of the opinions filed in this cause, which refer to and rely upon them. They will, of course, be found in full in the record in the main case against Eisner & Mendelson Company.

Two main points are involved in this case:

First, had the complainant at the time of the alleged infringement a valid trademark in the word

"Hunyadi" standing alone as denoting the Hungarian bitter water bottled and sold by her and her predecessor?

Second, had the complainant at the time of the alleged acts of infringement an exclusive right to the use of the distinctive style of label used upon the bottles containing the Hungarian bitter water bottled and sold by her?

It is uncontroverted that defendant has used the name "Hunyadi" in connection with the sale of Hungarian bitter waters not bottled and sold by the complainant. It is also uncontroverted that the bottles containing his said bitter waters have borne labels in close imitation, so far as general appearance goes, of those for many years used by complainant.

As to the use of the word "Hunyadi," defendant's contention is: First, that neither complainant nor her predecessor ever had an exclusive right to the use of the word "Hunyadi"; second, that even if she formerly had such right, this right was lost and abandoned by her laches and express declarations, and that long before the use of such name by defendant the word "Hunyadi" had become a general term denoting a class of bitter waters, and that it was so known to and used by the public, and in reliance upon a long undisputed and general use of said word he had innocently used the same in the belief, legally warranted, that he had a right so to do.

As to the use of the label, defendant's contention is that while it is true that this style of label or wrapper was originated by complainant's predecessor and for many years exclusively used by him, yet the same course of laches and declarations by complainant which had made the name "Hunyadi" public property, had likewise made this distinctive label public property, and that the label also had come to be one of the indicia of a class of Hungarian bitter waters, so that the same might honestly be used by anyone dealing in this class of bitter waters, so long as he did not seek to confuse his product

with that of complainant. The bill does not allege, nor does the record show, any confusion except such as may have arisen from the general similarity of the labels.

The Facts.

Andreas Saxlehner, the founder of complainant's business was a native of Hungary, residing at Buda-Pesth. In 1863 he commenced bottling and selling the waters from a mineral spring owned by him. By degrees he added other springs and extended the sale of their waters throughout the world. In 1889 he died, leaving a last will by which he made his wife, this complainant, his successor in business.

To the original spring opened by him Saxlehner had given the name "Hunyadi," and its waters were sold by him under the name "Hunyadi Janos." The name of the well was registered by him in Hungary in 1863 (Complt's Ex. No. 18 p. 79); and that of the water in 1873 (Complt's Ex. 19, 20 and 22, pp. 80–84). As early as 1873 he exported these waters to the United States under the name "Hunyadi Janos," and such exportations have constantly increased. At first they were made by Saxlehner himself, but on February 14, 1876, he made a contract with the Apollinaris Company (Complt's Ex. 4, p. 75), containing, among others, the following provisions:

> "Mr. Andreas Saxlehner abandons to the Apollinaris Company the exclusive sale of his natural Hundadi Janos bitter water in Great Britain, her colonies and dependencies, likewise in all transmarine countries and places, Smyrna excepted, for a term of 10, say ten years."
>
> "Mr. Andrew Saxlehner obliges himself henceforth not to accept orders arriving from the United States, but to make them over to the Apollinaris Company."

By an additional agreement (p. 78) this contract was continued for a further term of fifteen years.

From April 1st, 1876, therefore, until the termination of this contract on March 25th, 1896, the Apollinaris Company was the sole representative of Saxlehner in the United States; was, in fact, his *alter ego*.

Between 1863 and 1895 various other bitter waters were put upon the market in Hungary, bearing the name of Hunyadi, such as "Hunyadi Matyas," "Hunyadi Josef," "Hunyadi Arpad," Hunyadi Vilmos," "Hunyadi Alajos, "Hunyadi Jonas," "Hunyadi Miklos," and "Hunyadi Istvan" (pp. 28–31), and these names were registered by their owners. In or about 1895 the laws of Hungary relative to such registrations was changed, and thereupon the complainant procured the cancellation of the registry of all such marks except hers (pp. 22–23).

Just what was done in Hungary and what possible bearing it can have on the issues in this case is not clear. The principal evidence on these points is the deposition of Kalman Saxlehner, and he is not at all clear as to the legal effect of these acts. Apparently, however, the laws of Hungary prior to 1895 did not recognize a word standing alone as a trademark, and Saxlehner could have had no trademark there in the word "Hunyadi" alone until these laws were changed. Then, as the first user of such name, the trademark rights claimed by him therein were recognized and his competitors were forbidden to use the word.

But for nineteen years before this his water had been sold in large quantities by his consignees, the Apollinaris Company, throughout the United States, under its name of "Hunyadi Janos," and since an early period the same had also been known and called for under the name "Hunyadi" alone. During this same period, however, the various other Hunyadi waters already mentioned as having been

sold in Hungary, had been introduced into the United States and there sold in large quantities under their respective names, and they also had come to be generally known and called for by the name "Hunyadi" alone (pp. 106, 119, 121, 137)

At the time of making the contract with the Apollinaris Company in 1876 Saxlehner designed for the American trade the characteristic red and blue label ever since used and still used upon his bottles in this country (p. 15). All or nearly all the other Hunyadi waters, afterwards introduced here, bore substantially similar labels (pp. 35–36), (Complts. Ex. 13). Saxlehner's experience in Hungary with these labels was much the same as with the word "Hunyadi" (pp. 34-36).

Saxlehner was, no doubt, the first to introduce into this country a bitter water bearing the name "Hunyadi" and wrapped in the red and blue label, and his use of both has since been continuous and uninterrupted. If no acts of laches, acquiescence or abandonment had intervened the complainant would undoubtedly be entitled to-day to the exclusive enjoyment of both name and label.

But between the time when Saxlehner's bitter water was introduced into this country and the time when defendant commenced to sell his Hunyadi water various other bitter waters, as already stated, had been introduced into this country, all bearing the characteristic red and blue label (See testimony of Kalman Saxlehner and Isidor Haldenstein, Rec. pp. 35 and 36 and 116–122. See also Complainant's Exhibit No. 13, American Labels, and Defendant's Exhibit Haldenstein Table). The importation of these other Hunyadi waters commenced about 1886 and continued steadily until about 1896, and the same amounted to many thousands bottles (See Haldenstein Table, p. 149). During this same period Charles Graef & Co., the New York representatives of the Apollinaris Co., Saxlehner's sole agents in this country, sent broadcast

throughout the United States the circular found on page 150 of the Record, in which these words are found:

> "The word 'Hunyadi' having become a generic name for Hungarian bitter waters, good, bad or indifferent, the Apollinaris Co. affixed to the bottles of Hunyadi Janos or Hungarian bitter water, of which they have still the sole sale, a small yellow label with their red diamond, the object of this trade-mark being only to indicate to the public that the bottle so labeled is sold by the Apollinaris Co., Ltd."

This circular was distributed by mail to the trade to the extent of several thousand during the period from 1893 to March, 1896 (Rec., pp. 120, 121), and shows conclusively that the Apollinaris Co., at least, was thoroughly conversant with the wide-spread use of the word "Hunyadi" and the red and blue labels as applied to Hungarian bitter waters other than those of complainant, and that it acquiesced in such application by others, and by this circular formally abandoned the claim to an exclusive right to the use thereof. Such abandonment, it is urged, is imputable to the complainant, since by complainant's own act the Apollinaris Co. was her sole agent and had complete control over the business in the United States.

This record further shows that complainant and her predecessor were themselves actually aware of these facts.

Kalman Saxlehner (Rec., pp. 36, 37) states that the reason why his father or his mother did not institute suit earlier in this country against alleged infringers of their trade-mark label was that they were on bad terms with the Apollinaris Company, and further states that he knew all these matters at the time and later on heard the conferences which were held with complainant's lawyers.

Haldenstein (Rec., p. 119) also testifies, speaking of certain actions brought by the Apollinaris Company, that he was informed that Andreas Saxlehner was requested to assist in the prosecution of said actions.

Furthermore, as the record in the Eisner & Mendelson case shows and as is shown by the opinions of the Circuit Court and the Circuit Court of Appeals in that case, this information of Haldenstein was correct and these suits were voluntarily discontinued and the injunctions granted therein were dissolved upon the consent of the Apollinaris Company. These acts, taken together, undoubtedly show acquiescence in these numerous alleged infringements and a complete abandonment by the Apollinaris Company, with the knowledge and consent of Saxlehner, of the position that it had any exclusive right to the use either of the word "Hunyadi" or of the red and blue label. The Circuit Court of Appeals was correct in so construing these acts.

All these acts of laches, acquiescence and abandonment took place long prior to the alleged infringement by defendant, which, so far as the record shows, commenced at or about the time when he was notified in October, 1896. At this time the use of both name and label by other importers of Hungarian bitter water had continued for ten years practically without remonstrance from complainant, and later, as already stated, with the entire acquiescence of complainant and her agent. Under these circumstances the defendant had a right to rely upon such acquiescence and upon the formal declaration of abandonment contained in the Graef circular and evidenced by the removal of the injunctions formerly obtained. The defendant, therefore, in his use of both the name and label, acted with entire good faith and cannot be accused of willful fraud.

The Circuit Court found the defendant guilty of intentional fraud in the use of the label, but this

finding was reversed by the Circuit Court of Appeals. The record conclusively shows that the defendant did not adopt or originate this label, but that it was originated by Louis Schmidthauer in Hungary, where he then had the full legal right to use the same and where he registered it as a trademark according to law in July, 1892 (see Complainant's Exhibit No. 15, Rec., p. 94). The Circuit Court was undoubtedly misled by the testimony of defendant's former parter Pollitz in answer to 22 Q. (Rec., p. 54); but the Exhibit No. 15 just referred to conclusively shows that the defendant had nothing to do with the originating and adoption of this label, and the cross-examination of this witness (Rec., pp. 54, 55) shows that the use of both name and label by the defendant was innocent and in reliance upon the well-known generic character of both. In fact, the testimony of this witness (p. 53) shows that the water was imported under this label and that it was then considered necessary to use such label in order that the public might know that this water was a Hungarian bitter water (p. 55). It must be remembered that defendant's label bears his own name prominently and is similar to complainant's only in its general characteristics.

Complainant's Trademark is not the word "Hunyadi" alone, but the two words "Hunyadi Janos."

Under the Hungarian law the word "Hunyadi" was not complainant's trademark until the year 1896, even if under the Minister's Ukase it has been her trademark since that time. The mere fact that many other dealers in Hunyadi waters were permitted for many years to register as part of their trade name the word "Hunyadi," and were permitted for many years to deal undisturbedly in different Hunyadi waters in Hungary and all parts of Europe, proves that complainant and her predecessor had no monopolistic right in the word

"Hunyadi," and that that word was not a trademark. Kalman Saxlehner himself testifies (pp. 22–23) that not until 1895 was it possible under the laws of Hungary for complainant to have a trademark there in the word "Hunyadi."

The subsequent change of the Hungarian laws and the cancellation of the other Hunyadi marks cannot affect this question.

See

Hohner vs. Gratz, 50 Fed. Rep., 369.
Richter vs. Anchor Remedy Co., 52 Fed. Rep., 455.

But the word "Hunyadi" standing alone was never complainant's trademark. According to the certificate, found on pp. 80–81, Andreas Saxlehner registered in Hungary ten years after the sale and introduction of his bitter water into the markets of the world his trademark as Hunyadi Janos and not as Hunyadi.

It is true that we find on p. 98 a copy of Saxlehner's United States registered trademark. Registration for this trademark was applied for on November 12, 1886, that is, ten years after Saxlehner's rights, whatever they were in this country, had become vested and after the sale of his waters in this country. This certificate contains the following statement: "The trademark consists essentially of the said word-symbol 'Hunyadi' without regard to any one or more of the parts and features aforesaid in connection with which it has been used."

At this time, in 1886, there were numerous Hunyadi waters sold throughout the markets of the world. In a patent case a reissue under such circumstances would be invalid, for the reason that the rights of others having intervened the scope of the monopoly could not be broadened. So Saxlehner, after solemnly asserting in Hungary in 1873 that his trademark consisted of the words

"Hunyadi Janos," ought not to be permitted in 1886 to say that his trademark was the word "Hunyadi" standing alone.

As a matter of fact, the various certificates from Hungary show that the name of the spring was "Hunyadi," and that since 1865 the water was brought into commerce under the name of "Hunyadi Janos." In this connection the solemn statement made by Saxlehner in his last will and testament (p. 59), must not be overlooked; he says on November 24, 1887, long after the registry of his United States trademark, "I transfer exclusively to my beloved wife all my rights concerning my 'Hunyadi Janos' Bitter Water trademark, as well as those concerning the trademarks 'Kossuth,' 'Arpad,' 'Hunyadi Janos,' 'Hunyadi Erzsebet.'"

It seems to us that this is very strong evidence in support of our point that Saxlehner never claimed the word "Hunyadi" standing alone as his trademark, and the fact that he himself baptized another water "Hunyadi Erzsebet" goes to show that he himself considered the word "Hunyadi" to be a descriptive adjective, meaning Hungarian bitter water.

We believe that in accordance with the decision rendered by the Supreme Court of the United States in Corbin *vs.* Gould, 133 U. S., 308, Saxlehner is restricted to the trademark by him registered in Hungary in 1873, to wit, to the words "Hunyadi Janos."

See likewise, to the same effect, Richter *vs.* Anchor Remedy Co., 52 Fed. Rep.. 455.

The conduct of complainant and her predecessors and agents is such as to disentitle her to any relief in equity.

If complainant's conduct, as is contended, amounts to abandonment, there can be no question that she

has no standing in this Court. But even if it be held not to amount to positive abandonment, yet her laches has been so great and so general that she should not now be heard to demand an injunction against this defendant.

Mutual Life Ins. Co. *vs.* Austin, 168 U. S., 685, 691–701 (authorities discussed).

Gildersleeve *vs.* New Mexico Mining Co., 161 U. S., 573, 578–582.

Abraham *vs.* Ordway, 158 U. S., 416, 420–423.

Leggett *vs.* Standard Oil Co., 149 U. S., 287, 294.

Menendez *vs.* Holt, 128 U. S., 514.

From what has already been said it is very evident that whatever rights the complainant or her predecessor had in this word must begin with the introduction of the Hunyadi Janos water into this country by the Apollinaris Company. That was in 1876. Within a comparatively short period thereafter, as early as 1879, the markets of the world were flooded with different Hunyadi waters, and consequently the word "Hunyadi" ceased to mean the complainant's bitter water, even if it had ever meant that for a very short period anywhere in the world. The trade in these different Hunyadi waters having steadily increased in this country, not only do the complainant and her predecessor do nothing to assert their rights for years, but their *alter ego*, the Apollinaris Company, who made the word "Hunyadi Janos" a trademark in this country, if it ever was one, by their admission that the word had become a generic term, dedicate it to the public. That admission having been published broadcast throughout the country (and that was true at the time it was made there can be no doubt), complainant now asks this Court to interfere, and this interference is asked for,

after various dealers in Hunyadi Lajos, relying on the undisturbed use of the word Hunyadi by many others for many years, relying on the published statements of the complainant's representatives, have built up a business which began in 1892 with the importation of 667 cases, and had increased in 1895 to 5,148 cases (p. 149).

We believe that the logical, legal conclusion is that the word "Hunyadi" was abandoned to the public, and that the complainant and her predecessor have been guilty of such laches that she is now estopped from claiming the word "Hunyadi" as a trademark, even if it ever was such.

Inasmuch, therefore, as the complainant's right to the trademark in this country is based exclusively upon the acts of the Apollinaris Company in the introduction of complainant's bitter water and use of her trademark, she ought to be bound by all the acts of the Apollinaris Company during the continuance of their contract If the doctrine of agency is to be invoked to establish a trademark, it may equally be invoked to destroy it. This seems to be the substance of the decision of Judge Shipman, viz., that the Apollinaris Company, having become the assignee for the time being of Saxlehner's trademark, abandoned the same to the public and allowed it to become a generic name for Hungarian bitter waters. Abandonment may be shown as well by a course of conduct as by an express declaration.

It may be that the evidence of abandonment in this record is not as strong as it might be, but several other suits of this kind by this complainant against various defendants, notably the case against Eisner & Mendelson Co., are also before this Court, and the decision of those cases must have some bearing upon the decision in this case. If the evidence in those cases is sufficient to satisfy the Court that whatever rights complainant may have had in the word "Hunyadi" as a trademark for her

bitter waters, have been abandoned, and that this word has become a generic term, we think this defendant is entitled to the benefit of that conclusion. If in those cases the Court concludes that at the time when this defendant used the name complained of said name was already abandoned as a trademark and had become a generic term, that is *a fact* of which the Court in this case would take judicial cognizance.

There is, however, another reason why the word "Hunyadi" ceased to be a trademark, if it ever was one. In 1863 the word "Hunyadi" meant, as it is claimed, the bitter water from one certain spring.

Between 1870 and 1880 many new springs were opened upon Saxlehner's land. At present it means the water taken from any one or more of 112 wells located at different points within a plot of ninety acres of land. What at one time in 1863 meant the water of one certain well baptized "Hunyadi" has come to mean a mixed product containing certain salts in fixed proportions and having certain defined qualities.

We fail to see where the line is to be drawn, if the complainant has the right to mix up the waters of different wells located say one mile from the original Hunyadi spring, while others whose wells are located say fifty miles from the original Hunyadi spring have not the same right to call their bitter water Hunyadi, when, as a matter of fact, both are bitter waters having substantially the same ingredients.

If it is not a fraud upon the public in the one case it is not in the other. If it is a fraud in the complainant's case then she has lost her right to relief, and if it is not a fraud, then it is a concession that Hunyadi and Hungarian bitter water are synonymous terms.

There is still another reason in our judgment, why complainant has lost her right to the sole use

of the word "Hunyadi," if she ever possessed it, owing to the laches of which she and her predecessor were guilty.

What is a trademark? It is not a perpetual monoply under all circumstances. In the case of trade names like Singer, Linoleum, Castoria, used upon patented articles, the monoply ceased upon the termination of the patent, for the reason that the public having become accustomed to the trademark for many years and having been educated to recognize the articles under these names exclusively during the life of the patent, know no other name by which to designate the article.

So, in cases of this kind, where one adopts a name (and let us assume it is a valid trademark in its inception), and then for many years permits the public to be educated into the belief that the name is no longer the commercial signature of any particular trader, but is the name of the thing, then the monoply, if ever there was any, is voluntarily surrendered.

It is urged on behalf of complainant that no failure or delay to prosecute one infringer can be availed of by others, but that laches can be predicated only in regard to the specific infringement complained of. This might well be so if the question were of one contract or one relating to the parties alone; but in a trademark case such as the present, it would seem that the tort complained of is more analogous to a trespass upon lands where a right of way is claimed by the trespasser and where a long acquiescence in former trespasses by others gives rise to the presumption that a right of way has been granted. So, here, in regard to the word "Hunyadi," the defendant claims that he had a right to rely upon the failure of the complainant to object to the long continued and indiscriminate infringement of others, and to conclude that he also might use this word as it was used by

a large class of dealers, and by the public generally. So, also, as to the label.

Even if an injunction be granted, the complainant is not entitled to an accounting or to costs.

The laches of complainant and her predecessor in permitting the use of the word "Hunyadi" for a period of over ten years by numerous dealers in different Hunyadi waters disentitles her to an injunction and accounting.

See

Richardson vs. D. M. Osborne & Co., 82 Fed. Rep., 95.
Manufacturing Co. vs. Garner, 55 Barb., 151.
Clarke Thread Co. vs. Armitage, 74 Fed. Rep., 936.
Coats vs. Merrick Thread Co., 149 W. S., 562.

In Richardson *vs.* D. M. Osborne & Co., *supra*, Judge COXE said: "If this action can be maintained a patentee has simply to pocket his patent, wait until the field is full of infringers and begin his suit two months before the patent expires. When charged with laches he has simply to assert that until he commenced his suit he thought the chances of success dubious, and, therefore, did not call the infringers to account. It is plain that the public rights cannot depend upon considerations so shadowy, unilateral and inequitable. Unless the Court is prepared to say that the defense of laches will no longer be enforced in a patent suit it must find for the defendant on this issue. The law of laches is so well understood that it is unnecessary to restate it. It is thought that no case can be found excusing such delay as this record discloses" (see McLean *vs.* Fleming, 96 U. S., 245, and the numerous other cases cited).

In the case of Coats *vs.* Merrick Thread Co., in 149 U. S., 562, Justice BROWN said, page 573: "Indeed, the intent to imitate plaintiffs spool-heads, if any such intent existed, is manifest rather in the label than in the periphery, but plaintiffs having submitted to this without protest for twelve years, have waived their right to relief upon this ground." The Court quotes with approval the decision of McLaughlin *vs.* People's Railway Co., 21 Fed. Rep., 574, which was a patent case in which the plaintiff was guilty of such laches that the Court held that his conduct disentitled him to an injunction and accounting.

The Hunyadi Label.

The same cause of reasoning which has been applied to the question of complainant's trademark in the word "Hunyadi" is applicable also to the question of complainant's exclusive right to the use of her label. The testimony, both complainant's and defendant's, shows that for many years past, in fact almost since the very introduction of complainant's bitter waters into the markets of the United States, many other bitter waters have been sold here bearing labels very much resembling complainant's label, and certainly as much simulations of that label as is the label of defendant, and all this without a word of protest from the complainant. Complainant's own witness, James Pollitz, testifies (page 55), in speaking of the label used by defendant, that at the time when this label was first used by him the word "Hunyadi" had already become a generic term for Hungarian bitter waters and that the red and blue label had already become a characteristic of all Hungarian bitter waters, and that people would not recognize the water as a Hungarian bitter water unless it bore that label; also that

there were at that time various other Hungarian bitter waters in the market bearing the same red and blue label. And in answer to a most strongly leading question by complainant's counsel the same witness stated (pages 55–56) that his firm did not consider the Hunyadi Lajos label of the defendant an imitation, saying, "it looked very much like it, but we did not consider it an imitation because nobody objected to it." While the witness's conclusion is not particularly logical, his statement that nobody objected to the label is important and is binding upon the complainant.

Although the main contention of the complainant has been as to the use of the word "Hunyadi" and the evidence as to the label is somewhat slight, yet it clearly appears that the use of the one by competitors was almost invariably coupled with the use of the other. This is shown principally by complainant's own witnesses and exhibits. It would certainly seem, therefore, that the same rules should be applied to this question of the label as are applied to the question of the trademark and if the complainant is held to have lost her exclusive right to the word "Hunyadi" through her laches, it would equally seem that the same laches would preclude her from claiming an exclusive right to the peculiar form of label which, as one of her own witnesses has testified, was generally characteristic of Hunyadi bitter water.

If the decision of the Courts below as to the use of the word "Hunyadi" be sustained, there is still a further reason why no accounting or damages for the use of the label complained of should be decreed. Throughout this case complainant has proceeded upon the theory that she had a trademark in the word "Hunyadi"; that it was this trademark which was valuable to her and aided in selling her bitter water. There is no evidence whatever as to the value of the label to her and there is no evidence of any honest confusion between

her label and the defendant's label. Whatever part of defendant's profits could in any way have been due to his use of the label complained of must have been so minute as to be practically impossible to ascertain. In any event his willful use of this label could only have been during the period between October, 1896, when he received the notice from the complainant, and May, 1897, when he discontinued the use of the label, and in the absence of fraud on his part it would be unjust and inequitable to impose upon him the expense of a long and costly accounting in the attempt to discover the almost infinitesimal profits which might have been derived by him during this exceedingly short time from the use of said label.

The Defendant is not guilty of Intentional Fraud.

There is no evidence whatever that defendant designed or adopted the label complained of. In fact the evidence shows (p. 53) that the bitter waters sold by him bore this label when imported. Furthermore, the testimony of his former partner, Pollitz, one of complainant's witnesses, clearly shows that at the time when his use of this label began he believed he had a right to use it. Various bitter waters bearing the name "Hunyadi" and bearing labels almost exactly similar to defendant's label (Complainant's Exhibit 13) were then and for a long time had been upon the market, and no objection was made by anyone. In fact the defendant considered that it was necessary to use such a label in order to let the public know that his water was a Hungarian bitter water (pp. 54–55).

This defence is not merely specious but has substantial merit. It would certainly be reasonable for a dealer in champagne to-day to say that it was necessary for him to put up his champagne in a

certain form, in order that the public might know what it was. He would undoubtedly have great difficulty in selling it if he put it up in gin bottles. It is equally so with many products. The form in which they are dealt out to the public is an old and well known form which every dealer in those products is entitled to avail himself of. Someone must have originally adopted this form; but after many others have also adopted and used it without any objection from the originator, there is certainly nothing fraudulent or dishonest in a newcomer assuming that any exclusive right which the first inventor or user of this form might have had has been abandoned, and that he is free to use this form of package or wrapper. So, in the case of this defendant, the form of bottle, the word "Hunyadi" and the red and blue label had long been generally used in the trade, and had become well known as indicia, not of complainant's Hunyadi Janos water alone, but of all Hungarian bitter waters generally. The defendant thereupon received from Hungary an invoice of Hungarian bitter water put up and enclosed in such bottles and labels, and sells the same here in full confidence and with a reasonable belief that he has a right so to do. There is no fraud here. If defendant infringed at all upon complainant's rights, he did so innocently. In fact as soon as he was notified of complainant's claims and had reasonable opportunity to investigate the same, he voluntarily discontinued the use of the label complained of. This matter of fraud, it seems to us, is material upon the question of an accounting, in case the Court should find that the complainant is entitled to an injunction against the use of the label.

Conclusion.

No fraud of defendant has been shown.

Complainant's laches, acquiescence and abandonment have been such as to disentitle her to any injunction, much less to an accounting, damages or costs.

The cause should, therefore, be remanded, with instructions to dismiss the bill.

Respectfully submitted,

LOUIS C. RAEGENER,
Of Counsel.

New York, March 15th, 1900.

No. 33.

Notice, Motion re. Recall

mandate re.

Office Supreme Court U. S.
FILED
JAN 2 1901
JAMES H. McKENNEY,
Clerk

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 33

EMILIE SAXLEHNER,

Petitioner,

vs.

ALEXANDER NIELSEN.

Notice of Motion, Motion and Petition to Recall Mandate and Amend Decree.

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The Evening Post Job Printing House, New York.

Supreme Court of the United States.

1

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1900. No. 33.

Notice of Motion.

2

TO ALEXANDER NIELSEN, THE ABOVE NAMED DEFENDANT:

Please take notice that on Monday, January 7, 1901, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, a motion to recall the mandate herein and to make the decree of the Supreme Court of the United States entered herein on October 15, 1900, more definite and certain, of which motion a copy is annexed, will be submitted to said Supreme Court of the United States at the City of Washington, D. C., for the decision of the Court thereon.

3

In support of said motion a petition and a brief will also be presented to the Court. A copy of the petition is herewith served upon you.

New York, December 21, 1900.

Respectfully,

ANTONIO KNAUTH,
ARTHUR v. BRIESEN and
JOHN G. JOHNSON,
Advocates and of Counsel for Petitioner.

4 Due service of the foregoing notice of motion and of the annexed motion and petition is hereby admitted this day of December, 1900.

Defendant.

By

his Attorney and Counsel.

SUPREME COURT OF THE UNITED STATES.

5

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1900. No. 33.

Motion.

And now comes Emilie Saxlehner, the above named petitioner, by Antonio Knauth, Arthur v. Briesen and John G. Johnson, her advocates and
6 counsel, and moves this Honorable Court to recall its mandate issued herein on the 20th day of November, 1900, to the Circuit Court of the United States for the Eastern District of New York, for the purpose of amending the same and to make its decree entered herein on the 15th day of October, 1900, more definite and certain concerning the relief to be granted to the complainant.

The matter involved herein relates to the protection of the petitioner in the exclusive use of her peculiar shape of bottle, label and capsule, used for her "Hunyadi Janos" Bitter Water, and each one thereof, and the question to be determined arises

from the doubt of the Judge of the Circuit Court, who entered the decree of July 19, 1898, as to whether the direction contained in the last paragraph of said decree of the Supreme Court was meant to deny to the complainant the relief by injunction separately claimed in her bill of complaint upon her bottle, capsule and label, and each one thereof, and confine it to relief upon the label.

Dated December 21, 1900.

EMILIE SAXLEHNER,
Petitioner.

By ANTONIO KNAUTH,
ARTHUR v. BRIESEN and
JOHN G. JOHNSON,
Her Advocates and Counsel.

SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER, Petitioner, vs. ALEXANDER NIELSEN.	October Term, 1900. No. 33.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

The petition of Emilie Saxlehner, respectfully shows to this Court:

FIRST.—That on the 20th day of November, 1900, a mandate issued out of this Honorable Court to the Circuit Court of the United States for the Eastern District of New York, which recited a decree of this Court entered herein on October 15, 1900, and was in words as follows:

10 UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE HONORABLE THE JUDGES OF THE [SEAL.] CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK, GREETING:

WHEREAS, lately in the United States Circuit Court of Appeals for the Second Circuit, in a cause between Emilie Saxlehner, appellant, and Alexander Nielsen, appellee, and Alexander Nielsen, appellant, and Emilie Saxlehner, appellee, on appeal and cross-appeal, wherein the decree of the said Circuit Court of Appeals entered in said cause on the 24th
11 day of January, A. D. 1899, is in the following words, viz:

"This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed, that the decree of said Circuit Court be and it hereby is reversed as to the red and blue labels and remitted with instructions to dismiss the bill, with costs of this appeal.

It is further ordered, that a mandate issue to the said Circuit Court in accordance with this decree.

W. J. W.,
12 E. H. L."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of *certiorari* agreeably to the act of Congress in such case made and provided, fully and at large appears.

AND WHEREAS, in the present Term of October, in the year of our Lord one thousand nine hundred, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, 13
adjudged and decreed, by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby reversed with costs; and that the said Emilie Saxlehner recover against the said Alexander Nielsen three hundred and fifty-three dollars and fifteen cents for her costs herein expended and have execution therefor.

And it is further ordered, that this cause be, and the same is hereby remanded to the Circuit Court of the United States for the Eastern District of New York with directions to reinstate its decree of July 18, 1898, and for further proceedings consonant with the opinion of this Court.

October 15, 1900. 14

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this Court as according to right and justice, and the laws of the United States, ought to be had, the said writ of *certiorari* notwithstanding.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 20th day of November, in the year of our Lord one thousand nine hundred.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States. 15

COSTS OF SAXLEHNER.

Clerk	$148 40
Printing Record	184 75
Attorney	20 00
	$353 15

SECOND.—That said mandate was filed in the said Circuit Court on November 26, 190

THIRD.—That the bill of complaint in this case was of a similar character as that filed in the suit of

this complainant made against the Eisner & Mendelson Company in the Circuit Court of the United States for the Southern District of New York, and was argued and decided in and by the same Court and upon the same principles as established in said other case. That in said case against the Eisner & Mendelson Company the Circuit Court reached the conclusion that by addition of a "Seal Brand Label" the defendant in that case sufficiently avoided the charge of infringement, for which reason the claim of the bill of complaint for an injunction upon the bottle and capsule could not be successfully insisted upon. That thereafter, upon appeal to the Circuit Court of Appeals, both cases were dismissed by the Circuit Court of Appeals for the Second Circuit upon the same grounds in each case, and finally both cases were decided by the Supreme Court of the United States at the same time, and a decree made and mandate issued, as hereinbefore stated.

That on December 10, 1900, your petitioner, the complainant, presented to Honorable Nathaniel Shipman, a Judge of said Circuit Court, a proposed decree, injunction and accounting in said case against the Eisner & Mendelson Company, in which she prayed for injunctive relief upon her style of bottle, the same being of straight shape with a short neck, in connection with the sale of defendant's Bitter Water and also for an injunction against the use of any imitation of her label. That the Judge to whom said decree was presented entertained a doubt whether it was the intention of this Honorable Court by its opinion filed October 15, 1900, to grant to the complainant the relief for injunction prayed in her bill of complaint upon her peculiar shape of bottle, the design of her capsule and label and each one thereof, in accordance with the facts found and stated in the opinion of this Court, or whether the directions contained in the last paragraph of said opinion in the case against the Eisner & Mendelson Company were meant to confine said injunction to the label only,

in accordance with the terms of the decree of the 19
Circuit Court of April 29, 1898, and certified such doubt in a statement, a copy of which is hereto annexed marked Exhibit A.

FOURTH.—That the same question arises in this case, and your petitioner, unless she will be able to suppress the use of the capsule and peculiar shape of bottle adopted by the defendant in intended simulation of her style of bottles and capsules for her "Hunyadi Janos" Water, will be without remedy to prevent a continuation of the infringement upon her rights established by the findings of this Court and sustained in its opinion herein.

Wherefore, your petitioner prays for an order that 20
the said mandate be recalled and that the decree of this Court entered in this cause on October 15, 1900, be made more definite and certain, so as to remove the doubt aforesaid and grant to petitioner a decree of injunction for imitation of her label, capsule and shape of bottle, and each one thereof, as prayed in her bill of complaint, and that your petitioner have such further or other relief as may be deemed proper and in the interest of justice.

And your petitioner will ever pray, &c.

EMILIE SAXLEHNER,
By ANTONIO KNAUTH.

ARTHUR V. BRIESEN and 21
JOHN G. JOHNSON,
Her Advocates and Counsel.

22

Exhibit A.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMILIE SAXLEHNER,
Complainant,

vs.

EISNER & MENDELSON COMPANY,
23 Defendant.

SAME

vs.

SIEGEL-COOPER COMPANY.

SAME

vs.

24 RUDOLPH GIES.

SAME

vs.

LOUIS MARQUET.

Proposed decrees for injunction and accounting having been presented to me by counsel for the complainant and the defendants in supposed accordance

with the decrees of the Supreme Court of the United States herein, dated October 15, 1900, and the several mandates issued thereon to this Court, I certify that I entertain doubt on the question whether said Supreme Court intended to grant to the complainant the relief upon the shape of the bottle prayed in her several bills of complaint herein apart from the label, or intended to confine the relief to the label, whether used with or without the bottle, and that for this reason I have declined to sign any decree herein until such doubt will be removed by appropriate proceedings in the United States Supreme Court. 25

Dated December 17, 1900.

N. SHIPMAN, 26
Circuit Judge.

Office Supreme Court, U.S.
FILED
JAN 2 1901
JAMES H. MCKENNEY,
Clerk.

No. 33.

Brief of Knauth, Briesen & Johnson for Petitioner on mo

Supreme Court of the United States.

Filed Jan. 2, 1901.

OCTOBER TERM, 1900.

No. 33.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN.

Brief for Petitioner on Motion to Recall Mandate and Amend Decree.

ANTONIO KNAUTH,
ARTHUR v. BRIESEN,
JOHN G. JOHNSON,
Of Counsel for Petitioner.

The Evening Post Job Printing House, New York.

Supreme Court of the United States.

EMILIE SAXLEHNER, Petitioner,	October Term, 1900.
vs.	No. 33.
ALEXANDER NIELSEN.	

BRIEF ON BEHALF OF PETITIONER ON MOTION TO MAKE DECREE MORE DEFINITE AND CERTAIN.

A similar motion is made in this case by the petitioner as is made by her in the case against Eisner & Mendelson Company, No. 29, to make the decree of this Court entered on October 15, 1900, more definite and certain so as to enable the petitioner to enter a decree in the Court below enjoining the defendant from the use of any imitation of her bottle, label and capsule used for her Hunyadi Janos water, in accordance with the prayer of her bill of complaint.

As is stated in the opening part of the opinion of this Court the bill of complaint in this case sought to enjoin the defendant from selling a water under the name of "Hunyadi Lajos" or any other name in which the word "Hunyadi" occurred, as well as selling such water in bottles or under capsules or labels resembling those of the plaintiff upon her bottles of Hunyadi Janos water. The charge of in-

fringement and the prayer for relief were substantially like those in the case against the Eisner & Mendelson Company (Record, pp. 4 and 6 respectively), the defendant's answer denied such infringement upon plaintiff's bottle, label and capsule and claimed for the bottle and capsule the same defenses as were claimed on behalf of the label (Record, p. 102), which defense was in substance that while the similarity was admitted, it was claimed that the general style of bottle, capsule and label had lost their individuality and other indication of ownership by long undisturbed use.

The evidence did not leave any doubt upon the question of plaintiff's adoption of the peculiar style of bottle, the same being of a straight shape with a short neck, to the top of which was attached a metal capsule bearing a circular inscription surrrunding the portrait (Record, p. 12), and the close similarity and practical identity of defendant's bottle and capsule (Record, p. 18). As in the other case, already mentioned, the evidence also showed that different other bitter waters were sold in bottles of different shapes and sizes on the American market (Record, p. 33).

The case was originally to have been argued at final hearing in the Eastern District of New York, but was assigned to be heard by the same Judge in the Southern District before whom the principal case against the Eisner and Mendelson Company was argued at final hearing, and it was argued, submitted and decided at the same time and in substantially the same manner. The Judge of the Circuit Court who decided the case against the Eisner & Mendelson Company came to the conclusion that, while plaintiff's style of bottle, capsule and label had been clearly imitated, the defendant in that case escaped the charge of infringement by adding to the label on the bottles its own seal brand label. Holding this view, he could not grant the complainant more than a decree upon the label only when used without the seal brand label. The consequence

was that he directed in the present case also the entry of a decree upon the label merely, although the very decree entered by him recognizes that the defendant has sold "bitter water in bottles like those used by complainant for her said Hunyadi Janos bitter water, the same being of a straight shape with a short neck, bearing labels, &c." (Record, p. 152).

The complainant's assignment of errors covered every particular of the relief which the complainant had demanded, and which had been denied to her by the Circuit Court (Record, pp. 155-156), but even if that had not been sufficiently assigned, this Court had undoubtedly the power to correct any error committed by the Court below in adjudicating the rights of the complainant and their violation.

U. S. *vs.* Tenn. & C. R. Co., 176 U. S., 242, 256.

This Court has found very explicitly in the principal case against the Eisner & Mendelson Company that Saxlehner had acquired a right to be protected in the shape of his bottles, the design of his capsules and his labels, against fraudulent imitation, and has also found that the defenses successfully made against complainant's claim under the name "Hunyadi" did not apply to the style of the bottles or labels. Inasmuch as the decree in this case, made by the Circuit Court, states that the defendant had sold his water in such bottles imitating those of the complainant, it is evident that the complainant should be entitled to the same relief as in the other case, and in our opinion this was intended as much by this Court as it was intended by the courts below, which in every instance decided the two cases in the same manner and upon substantially the same proofs.

We will not repeat here the argument nor cite the authorities given, cited by us upon our brief in the principal case to show that complainant is entitled to suppress the use of her style of bottles in the same manner as her style of labels, and that if

either of them is withheld from her, manifest injustice will result in this case.

In cases of unfair competition it is not possible to define the relief more than by general statements, and the relief depends very much upon the question of how far the defendant is allowed to use any of the insignia of plaintiff's trade. Here the defendant, by the final decree of this Court, is enabled to use with impunity the name "Hunyadi Lajos," although it is not only similar in sound to plaintiff's trade name "Hunyadi Janos," but even contains the complainant's original trademark "Hunyadi." By a force of circumstances, of which she was the unfortunate victim, she has lost the trade name "Hunyadi" and the defendant is able to sell a similar water under the name which for many years denoted only complainant's product. In that situation a duty arises very clearly on the part of the defendant so to dress his goods as to avoid every possible confusion with complainant's Hunyadi water, and an injunction upon the shape of the bottle and capsule is therefore called for much more emphatically than if defendant had been enjoined from the use of the name "Hunyadi." If such an injunction should be withheld from her in this case, the consequence would be that the innocent retailer of this water, the Siegel-Cooper Company, would be more restricted than the fraudulent originator of the imitation, the defendant in this case, because under the direction of this Court the complainant is clearly entitled to enter in the suit against the Siegel-Cooper Company a decree of injunction against the use of the bottle, capsule and label, as prayed in her bill of complaint.

It seems to us very clear that this Court did not intend by the concluding sentence of its opinion to restrict the Circuit Court to the entry of a decree, confined to the label only, such as that of July 18, 1898, but in view of the doubt entertained by the Judge of the said Circuit Court, and certified to by

him in the case against the Eisner & Mendelson Company, we respectfully ask that the directions of the decree of this Court of October 15, 1900, be made so definite and certain as to enable the petitioner to enter a decree upon the shape of the bottle, design of capsule and label in the Court below in accordance with the prayer of her bill of complaint in this case.

Respectfully submitted,

ANTONIO KNAUTH,
ARTHUR V. BRIESEN and
JOHN G. JOHNSON,
Of Counsel for Petitioner.

4930

No. 33.

Brf. of Raegener for Motion.

Office Supreme Court U. S.
FILED
JAN 7 1901
JAMES H. MCKENNEY,
Clerk.

Filed Jan. 7, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 33.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN,
Respondent.

Brief for Respondent on Motion to Recall Mandate and Amend Decree.

LOUIS C. RAEGENER,
Of Counsel for Respondent.

WM. SIEGRIST, Law Printer, 142-144 Worth St., New York.

SUPREME COURT OF THE UNITED STATES.

EMILIE SAXLEHNER,
Petitioner,

vs.

ALEXANDER NIELSEN,
Respondent.

October Term,
1900, No. 33.

BRIEF ON BEHALF OF RESPONDENT ON MOTION TO RECALL MANDATE AND AMEND DECREE.

This motion is an attempt on the part of the complainant to revive an issue originally raised by the pleadings, but never in any sense litigated in this case, and now for the first time to bring forward a claim never before seriously made, and one which the defendant had every reason to believe was abandoned.

The complainant now seeks to obtain an injunction against the bottle used by defendant. The moving papers in some degree obscure the point of the motion by referring to the bottle, capsule and label together, but the certificate of the Circuit Judge clearly shows what the petitioner really seeks.

It is true that the bill of complaint alleged the adoption of a distinctive style of bottle by complainant and asked an injunction against the use of the same by defendant; but except for the testimony of the witness Saxlehner (who, in giving a general

history of the Hunyadi business, referred in passing to the adoption of the distinctive style of bottle by his father) there is nothing in the record to show that complainant seriously claimed any exclusive rights in the bottle. There is nothing to show that the style of bottle used by Saxlehner was original with him or that his use was exclusive, or that the public attached any meaning whatever to its use by him. There is no evidence that any one was ever deceived through the use of a similar bottle either by defendant or anyone else, and all the evidence in the record is to the effect that the deception and uncertainty arose through the use of the label.

Furthermore, complainant put in evidence two bottles, "Complainant's Exhibit Franz Josef Bottle" and "Complainant's Exhibit Mattoni's Bottle" (Rec., p. 67), both of which are the same bottle as complainant's, although, as the record shows (pp. 66, 67), neither of these waters was known in this country as a "Hunyadi" water. This shows conclusively that the use of this style of bottle by complainant was not exclusive, and that it did not convey to the public any intimation that the waters contained therein were complainant's, or even that they were "Hunyadi" waters. We believe that there is no other evidence on this point in this record; but the record in the principal case against Eisner & Mendelson Co. teems with evidence to show that complainant never had any exclusive right in the shape of the bottle used by her and her predecessors. By courtesy of counsel we are permitted to refer to defendant's brief in that case, and we respectfully ask that the Court will consider it in this case also.

The decree of the Circuit Court was drawn by complainant's solicitors, and was signed without change and without objection on the part of defendant. That decree does not in any way award an injunction against the use of the bottle, although

nothing in the opinion of the Circuit Judge prohibited complainant asking such an injunction if she then deemed herself at all entitled thereto. On the Appeal to the Circuit Court of Appeals no reference whatever was made to the bottle, and no error was assigned for failure to grant an injunction against the bottle. The ninth assignment of error is altogether too general to cover this point, and complainant should not now be heard to raise a point on such general assignment of errors which was not fairly raised in the Court below, and in regard to which no ruling was there asked.

Ansbro vs. U. S., 159 U. S., 695, 698.

The opinion of this Court in this case does not in any way suggest that the use of the bottle by defendant should be enjoined, and specifically directs that the decree of the Circuit Court herein be reinstated. The mandate directed accordingly. We submit that this is in accordance with the intention of this Court. Upon the facts as established by this record, the defendant has the absolute right, in connection with the sale of genuine Hungarian bitter waters, to use the bottle which by long custom has become associated with Hungarian bitter waters generally. The laws of Hungary, where his water is bottled, give him this right, and it would amount to a practical destruction of his business to compel him to re-bottle it here.

It is respectfully represented that the decision and mandate of the Court herein give complainant all the relief that she is entitled to and need no correction.

Respectfully submitted,

LOUIS C. RAEGENER,
Of Counsel for Defendant.

Supreme Court of the United States.

No. 33.—October Term, 1900.

Emilie Saxlehner
vs.
Alexander Nielsen.
} On writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[October 15, 1900.]

This was a bill of similar character to those involved in the prior cases, and was brought to enjoin the defendant from selling water under the name of "Hunyadi Lajos," or any other name in which the word "Hunyadi" occurs, as well as selling such water in bottles or under capsules or labels resembling those of the plaintiff upon her bottles of "Hunyadi Janos" water. The answer pleaded abandonment and laches. The Circuit Court made a similar decree to that in the Eisner and Mendelson suit, enjoining the infringement of plaintiff's red and blue label, requiring an accounting for damages, and denying relief against the use of the name "Hunyadi." The Circuit Court of Appeals reversed this decree, and ordered the bill to be dismissed.

Mr. Justice Brown delivered the opinion of the Court.

The evidence in this case is much less complete than that in the cases just decided, although its general tendency is much the same. Plaintiff proved the adoption of the name "Hunyadi" by certificate of the Municipal Council of Buda, dated January 19, 1863, authorizing Saxlehner to give his spring the name of "Hunyadi Spring," and by other certificates of a similar character.

It was shown that Andreas Saxlehner had used uninterruptedly the trade-mark "Hunyadi Janos" ever since 1865; that in 1873 he had registered this trade-mark in Hungary, and that plaintiff had re-registered the same in 1890. It was admitted that, if the plaintiff had not been guilty of laches, acquiescence or abandonment, she would undoubtedly be entitled to the exclusive enjoyment of both name and label.

But the contract with the Apollinaris Company was also put in evidence, together with testimony showing that from 1886, when the Hunyadi Arpad water began to be imported, some fourteen different Hunyadi waters were put upon the American market without opposition on the part of Saxlehner or the Apollinaris Company, and that the name "Hunyadi" had become widely known in this country as applicable to Hungarian bitter waters. Of some of these waters the importations were as

high as six or seven thousand cases a year. As stated in the former opinion, the use of the name "Hunyadi" had become generic in Hungary, and Saxlehner could not have been ignorant of this fact, or of the further fact that exportations of these waters were constantly being made to foreign countries. He was, at least, put upon inquiry as to whether these waters were not being sold in America in competition with his own, and he should have either instructed the Apollinaris Company to prosecute the infringements, or instituted proceedings himself to vindicate his proprietary interest in the name. Under such circumstances we think it too late now to maintain an exclusive title on the part of the plaintiff to the name "Hunyadi," and that she has been guilty of laches which preclude her right to an injunction.

So far as the question of label is concerned, plaintiff's witnesses proved sales of the Hunyadi Janos water in this country since about 1870, first under a red and white label and afterwards under the red and blue label. Defendant's water does not come from the neighborhood of Buda-Pesth, but from a spring situated at Kocs, more than a hundred miles from that place, though the water is apparently of similar character. His label appears to have been designed originally by one Schmidthauer, in Hungary, where it was registered as a trade-mark in July, 1892, and introduced the same year into this country. The label is so obviously an imitation of the Saxlehner label that defendant makes no argument to the contrary, and the appearance of the two is so nearly alike that a casual purchaser would easily suppose he was purchasing the Hunyadi Janos water in buying that of the defendant. The record also shows that the trade-mark registered by Schmidthauer in July, 1892, as above stated, was canceled by the Gyor Chamber of Commerce and Industry on March 24, 1897. There seems to have been no excuse for the adoption of this label except the fact that so many dealers of bitter water in Hungary had seized upon Saxlehner's name and label that it was treated as public property. For the reasons stated in the former case, we think that defendant should be held accountable for this misappropriation.

The decree of the Circuit Court of Appeals will therefore be reversed, and the case remanded to the Circuit Court for the Eastern District of New York with direction to reinstate its decree of July 18, 1898, and for further proceedings consonant with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.